# CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of**

**Decisions, Rulings, Regulations, Notices, and Abstracts**

**Concerning Customs and Related Matters of the**

**U.S. Customs Service**

**U.S. Court of Appeals for the Federal Circuit**

**and**

**U.S. Court of International Trade**

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

## NOTICE

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# U.S. Customs Service

## *Treasury Decision*

19 CFR Part 12

(T.D. 97–80)

RIN 1515–AC22

### IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL ARTIFACTS FROM MALI

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the imposition of import restrictions on culturally significant archaeological artifacts from the region of the Niger River Valley of Mali and the Bandiagara Escarpment (Cliff), Mali. These restrictions are being imposed pursuant to an agreement between the United States and Mali that has been entered into under the authority of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The document also contains the Designated List of Archaeological Material that describes the articles to which the restrictions apply. These import restrictions imposed pursuant to the bilateral agreement between the United States and Mali continue the import restrictions that were imposed on an emergency basis in 1993. Accordingly, this document amends the Customs Regulations by removing Mali from the listing of countries for which emergency actions imposed the import restrictions and adding Mali to the list of countries for which an agreement has been entered into for imposing import restrictions.

EFFECTIVE DATE: September 23, 1997.

FOR FURTHER INFORMATION CONTACT: (Legal Aspects) Donnette Rimmer, Intellectual Property Rights Branch (202) 482–6960; (Operational Aspects) Joan E. Sebanaler, Trade Operations (202) 927–0402.

## SUPPLEMENTARY INFORMATION:

### BACKGROUND

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub.L. 97–446, 19 U.S.C. 2601 *et seq.*) ("the Act"). This was done to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind's common heritage. The U.S. is, to date, the only major art importing country to implement the 1970 Convention.

During the past several years, import restrictions have been imposed on an emergency basis on archaeological and ethnological artifacts of a number of signatory nations as a result of requests for protection received from those nations as well as pursuant to bilateral agreements between the United States and other countries.

Mali has been one of the countries whose archaeological material has been afforded emergency protection. In T.D. 93–74, § 12.104g(b), Customs Regulations, (19 CFR § 12.104g(b)) was amended to reflect that archaeological material from the region of the Niger River Valley in Mali and the Bandiagara Escarpment (Cliff) in Mali forming part of the remains of the ancient sub-Sahara culture received import protection under the emergency protection provisions of the Act.

Import restrictions are now being imposed on these same archaeological artifacts from Mali as the result of a bilateral agreement entered into between the United States and Mali. This agreement was entered into on September 19, 1997, pursuant to the provisions of 19 U.S.C. 2602. Protection of the archaeological material from the region of the

Niger River Valley in Mali and the Bandiagara Escarpment (Cliff) in Mali previously reflected in § 12.104g(b) will be continued through the bilateral agreement without interruption. Accordingly, § 12.104g(a) of the Customs Regulations is being amended to indicate that restrictions have been imposed pursuant to the agreement between the United States and Mali and the emergency import restrictions on certain archaeological material from Mali is being removed from § 12.104g(b) as those restrictions are now encompassed in § 12.104g(a).

## Material and Sites Encompassed In Import Restrictions

In reaching the decision to recommend that negotiations for an agreement with Mali should be undertaken to continue the imposition of import restrictions on certain archaeological material from Mali, the Deputy Director of the United States Information Agency made a determination that the cultural patrimony of Mali continues to be in jeopardy from pillage of irreplaceable materials representing Mali heritage and that the pillage is endemic and substantially documented with respect to sites in the region of the Niger River Valley and the Bandiagara Escarpment (Cliff) of Mali. The Deputy Director listed the following archaeological material from the following sites as those that are in need of protection:

Material: Archaeological material from sites in the region of the Niger River Valley and the Bandiagara Escarpment (Cliff), Mali, dating from approximately the Neolithic period to approximately the 18th century, identifiable by unique stylistic features, by medium, and where possible, by historic and cultural context. This archaeological material includes, but is not limited to: terra cotta statues depicting anthropomorphic and zoomorphic figures and terra cotta common vessels; copper and copper alloy materials, such as bronze, from which have been produced figurines and other objects such as pendants, finger bells, bells and bracelets; iron figures; and glass beads. Other archaeological material is identifiable as coming from the Tellem burial caves of the Bandiagara Escarpment (Cliff) and includes, but is not limited to: iron headrests; rings; bracelets; hairpins; fingerbells; bronze pendants; carved wood anthropomorphic and zoomorphic figures; carved wood headrests; wood bowls, spoons, hoes, axes, bows, arrows quivers, flutes, harps and drums; leather sandals, boots, knife-sheaths and plaited bracelets; ritual and utilitarian pottery, three/four-footed ceramic bowls; textiles of cotton and wool that are the remnants of tunics and coifs, blankets, skirts; organic fiber from which belts were made; glass beads; stone (carnelian) beads; and stone (quartz) lip plugs.

Sites: Sites include, but are not limited to: Djenne and Guimbala of the Inland Niger Delta; Bougouni of the Upper Valley of the Niger River; and the Bandiagara Escarpment (Cliff); and are recognized to be of high cultural significance. These sites represent a continuum of civilizations from the Neolithic period to the colonial occupation of the 18th century, and lend an archaeological significance to the region.

## DESIGNATED LIST

The bilateral agreement between Mali and the United States covers the material set forth in a Designated List of Archaeological Material from the Region of the Niger River Valley, Mali and the Bandiagara Escarpment (Cliff), Mali, which is set forth below. Importation of articles on this list is restricted unless the articles are accompanied by documentation certifying that the material left Mali legally and not in violation of the export laws of Mali.

## ARCHAEOLOGICAL MATERIAL FROM THE REGION OF THE NIGER RIVER VALLEY, MALI AND THE BANDIAGARA ESCARPMENT (CLIFF), MALI

The following categories of material are restricted from importation into the U.S. unless accompanied by a verifiable export certificate issued by the Government of Mali—archaeological material from the Region of the Niger River Valley, Mali and the Bandiagara Escarpment (Cliff), Mali, that includes, but is not limited to, the categories listed below. As this region is further excavated, other types of material may be found and added to an amended list. The following list is representative only. Any dimensions are approximate.

I. Ceramics/Terra Cotta/Fired Clay

Types of ceramic forms (stylistically known as Djenne-jeno or Jenne, Bankoni, Guimbala, Bambara, Bougouni and other stylistic labels) that are known to come from the region include, but are not limited to:

A. Figures/Statues.

1. Anthropomorphic figures, often incised, impressed and with added motifs, such as scarification marks and serpentine patterns on their bodies, often depicting horsemen or individuals sitting, squatting, kneeling, embracing, or in a position of repose, arms elongated the length of the body or crossed over the chest, with the head tipped backwards. (H: 6–30 in.)

2. Zoomorphic figures, often depicting a snake motif on statuettes or on the belly of globular vases. Sometimes the serpent is coiled in an independent form. A horse motif is common, but is usually mounted. Includes quadrupeds. (H: 6–30 in.)

B. Common Vessels.

1. Funerary jars, ocher in color, often stamped with chevrons. (H: 50 to 80 cm.)

2. Globular vases often stamped with chevrons and serpentine forms. (H: under 10 in.)

3. Bottles with a long neck and a belly that is either globular or streamlined. Some have lids shaped like a bird's head.

4. Ritual pottery of the Tellem culture, decorated with a characteristic plaited roulette.

a. Pot made on a convex mold built up by coiling.

b. Hemispherical pot made on three or four legs or feet resting on a stand. (H: 18 cm.)

5. Kitchen pottery of the Tellem culture with the paddle-and-anvil technique decorated with impressions from woven mats. (H: 20 cm.)

II. Leather

Objects of leather found in Tellem funerary caves of the Bandiagara Escarpment include, but are not limited to:

A. Clothing.

1. Sandals often decorated and furnished with a leather ankle protection.
2. Boots profusely painted with geometric designs.
3. Plaited bracelets.
4. Knife-sheaths.
5. Loinskin.
6. Bag.

III. Metal

Objects of metal from the region of the Niger River Valley and the Bandiagara Escarpment include the following components:

A. Copper and Copper Alloy (such as Bronze).

1. Figures/Statues.

a. Anthropomorphic figures, including equestrian figures and kneeling figures. (Some are miniatures no taller than 2 inches; others range from 6 to 30 inches).

b. Zoomorphic figures, such as the bull and the snake.

2. Bells (4–5 in.) and finger bells (2–3 in.).
3. Pendants, known to depict a bull's head or a snake. (H: 2–4 in.)
4. Bracelets, known to depict a snake (5–6 in.).
5. Bracelets, known to be shaped as a head and antelope (3–4 in.).

B. Iron.

1. Figures/Statues.

a. Anthropomorphic figures. (H: 5–30 in.)

b. Zoomorphic figures, sometimes representing a serpent. (H: 5–30 in.)

2. Headrests of the Tellem culture.
3. Ring-bells or fingerbells of the Tellem culture.
4. Bracelets and armlets of the Tellem culture.
5. Hairpins, twisted and voluted, of the Tellem culture.

IV. Stone

Objects of stone usually found in Tellem funerary caves of the Bandiagara Escarpment include, but are not limited to:

A. Carnelian beads (faceted).
B. Quartz lip plugs.

V. Glass Beads

Glass beads have been recovered in the Tellem funerary caves and in archaeological sites in the region of the Niger River Valley.

VI. Textiles

Textile objects, or fragments thereof, have been recovered in the Tellem funerary caves of the Bandiagara Escarpment and include, but are not limited to:

A. Cotton.

1. Tunics.
2. Coifs.
3. Blankets.

B. Vegetable Fiber.

Skirts, aprons and belts—made of twisted and intricately plaited vegetable fiber.

C. Wool.

Blankets.

VII. Wood

Objects of wood may be found archaeologically (in funerary caves of the Tellem or Dogon peoples in the Bandiagara Escarpment, for example).

**Archaeological material of wood.** Following are representative examples of wood objects usually found archaeologically:

A. Figures/Statues.

1. Anthropomorphic figures—usually with abstract body and arms raised standing on a platform, sometimes kneeling. (H: 10–24 in.)
2. Zoomorphic figures—depicting horses and other animals. (H: 10–24 in.)

B. Headrests.

C. Household Utensils.

1. Bowls.
2. Spoons—carved and decorated.

D. Agricultural/Hunting Implements.

1. Hoes and axes—with either a socketed or tanged shafting without iron blades.
2. Bows—with a notch and a hole at one end and a hole at the other with twisted, untanned leather straps for the "string".
3. Arrows, quivers.
4. Knife sheaths.

E. Musical Instruments.

1. Flutes with end blown, bi-toned.
2. Harps.
3. Drums.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because the amendment to the Customs Regulations contained in this document imposing import restrictions on the above-listed Malian cultural property is being made in response to a bilateral agreement entered into in furtherance of the foreign affairs interests of the United

States, pursuant to section 553(a)(1) of the Administrative Procedure Act, (5 U.S.C. 553(a)(1)), no notice of proposed rulemaking or public procedure is necessary. For the same reason, a delayed effective date is not required.

## REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

## EXECUTIVE ORDER 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

## DRAFTING INFORMATION

The principal author of this document was Keith B. Rudich, Esq., Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

## LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspections, Imports, Cultural property.

## AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

## PART 12—[AMENDED]

1. The general authority and specific authority citation for Part 12, in part, continue to read as follows:

**Authority:** 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * * * *

2. In § 12.104g, paragraph (a) the list of agreements imposing import restrictions on described articles of cultural property of State Parties is amended by adding Mali in appropriate alphabetical order as follows:

| *State* | *Cultural Property* | *T.D. No.* |
|---|---|---|
| * * * | * * * | * |
| Mali ..... | Archaeological material from the Niger River Valley Region, Mali, and the Bandiagara Escarpment (Cliff) forming part of the remains of the sub-Sahara culture. | T.D. 97–80 |
| * * * | * * * | * |

3. In § 12.104(g), paragraph (b), the list of emergency actions imposing import restrictions on described articles of cultural property of State parties is amended by removing the entry for "Mali" in its entirety.

SAMUEL H. BANKS,
*Acting Commissioner of Customs.*

Approved: September 12, 1997.

JOHN P. SIMPSON,
*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, September 23, 1997 (62 FR 49594)]

# U.S. Customs Service

## *General Notices*

### EXPANSION OF NATIONAL CUSTOMS AUTOMATION PROGRAM TEST REGARDING ELECTRONIC PROTEST FILING

AGENCY: Customs Service, Treasury.

ACTION: General notice; expansion of program.

SUMMARY: This notice announces Customs plan to expand its program regarding the electronic filing of protests to encourage new participants. Also, public comments concerning any aspect of the test are solicited.

EFFECTIVE DATE: The testing period, which was scheduled to end on April 30, 1997, is now extended through December of 1997.

ADDRESSES: Written comments regarding this notice or any aspect of this test should be addressed to the Chief, Commercial Compliance Branch, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 1313, Washington, D.C. 20229–0001.

FOR FURTHER INFORMATION CONTACT: For operational or policy issues: Neil Shannon, Chief, Commercial Compliance Branch, (202) 927–0300.

For protest system or automation issues: Steve Linnemann, Office of Information and Technology, (202) 927–0436.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 30, 1996, Customs published in the Federal Register (61 FR 3086) a general notice announcing, as part of the National Customs Automation Program (NCAP), a test regarding the electronic filing of protests. The test began on May 1, 1996, was to last six months, but was extended through April of 1997, when a second general notice was published on December 31, 1996, in the Federal Register (61 FR 69133). The test allows the following actions to be filed and tracked electronically:

(1) protests against Customs decisions under 19 U.S.C. 1514;

(2) claims for refunds of duties deposited or for corrections of errors requiring reliquidation pursuant to 19 U.S.C. 1520(c) and (d); and

(3) interventions in an importer's protest by an exporter or producer of merchandise from a country that is a party to the North American Free Trade Agreement (NAFTA) under § 181.115 of the Customs Regulations (19 CFR 181.115).

Participation in this NCAP component is available to all interested parties. If you already are an ABI participant, you can take advantage of electronic protest immediately by contacting you local Customs Client Representative. If you are not an ABI participant, write a letter on you company's letterhead indicating your interest in electronic protest filing. The information provided should include your company's name, address, telephone number, and the name of a contact person. Send the letter to:

U.S. Customs Service
Office of Information and Technology
User Support Services Division
Trade Support, Room 2419
1301 Constitution Avenue, N.W.
Washington, D.C. 20229

EXPANSION OF TEST

This notice informs the public that Customs is expanding the program for the electronic filing of protests to encourage new participants. Also, public comments concerning any aspect of the test are solicited.

Customs anticipates that this NCAP component will be available to all interested parties by January of 1998.

Dated: September 19, 1997.

ROBERT S. TROTTER,
*Assistant Commissioner,*
*Office of Field Operations.*

[Published in the Federal Register, September 24, 1997 (62 FR 50053)]

## MODIFICATION OF NATIONAL CUSTOMS AUTOMATION PROGRAM TEST REGARDING RECONCILIATION

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: A notice published in the Federal Register on February 6, 1997, announced Customs plan to conduct a prototype test of reconciliation. This document is a replacement for that notice. This document notifies the trade community of changes to the prototype test and sets forth the policy which makes this prototype the exclusive means to reconcile entries, pursuant to 19 U.S.C. 1484(b). The prototype will henceforth be referred to as the Automated Commercial System (ACS) Reconciliation Prototype.

This document invites public comments concerning any aspect of the planned test, informs interested members of the public of the requirements for voluntary participation, and establishes the process for developing evaluation criteria. To participate in this prototype, certain information, as outlined in this notice, must be filed with Customs prior to filing Reconciliations. It is important to note that resources expended by the trade and Customs on these prototypes may not carry forward to the final program.

EFFECTIVE DATE: The testing period of this prototype will commence no earlier than October 1, 1998, will run for approximately two years, and may be extended. The prototype will be limited to consumption entries filed on or after October 1, 1998, through September 30, 2000. Comments concerning the test are requested by November 14, 1997. A subsequent notice will be published in the Federal Register to announce the opening date of the application period, and specify any changes made to this prototype as a result of the comments received from the public.

ADDRESSES: Written comments regarding this notice should be addressed to Ms. Shari McCann, Reconciliation Team, U.S. Customs Service, 1301 Constitution Ave, NW, Room 1315, Washington, DC, 20229–0001.

FOR FURTHER INFORMATION CONTACT: Ms. Shari McCann, at (202) 927–1106, or Mr. Don Luther at (202) 927–0915.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

Title VI of the North American Free Trade Agreement Implementation Act (the Act), Pub.L. 103–182, 107 Stat. 2057 (December 8, 1993), contains provisions pertaining to Customs Modernization (107 Stat. 2170). Subtitle B of Title VI establishes the National Customs Automation Program (NCAP)—an automated and electronic system for the

processing of commercial importations. Section 637 of the Act amended Section 484 of the Tariff Act of 1930 to establish a new subsection (b), entitled "Reconciliation", a planned component of the NCAP. Section 101.9(b) of the Customs Regulations (19 CFR 101.9(b)) provides for the testing of NCAP components. *See*, TD 95–21. This test is established pursuant to those regulations. This document modifies the prototype test of reconciliation that was announced in the Federal Register (62 FR 5673) on February 6, 1997, and replaces that document.

*In General*

Concurrent with this Automated Commercial System (ACS) Reconciliation Prototype, Customs is designing a reconciliation component under the National Customs Automation Program Prototype (NCAP/P) in the Automated Commercial Environment (*see*, 62 FR 14731, dated March 27, 1997).

Thus, except for participation in the NCAP/P and upon implementation of this prototype, any party who elects to reconcile entries pursuant to 19 U.S.C. 1484(b) may ***only*** do so through this prototype. This prototype will serve as the ***exclusive means*** to reconcile entries for (1) value, (2) classification, (3) merchandise entered under Harmonized Tariff Schedule of the United States (HTSUS) heading 9802 or (4) merchandise entered under the North American Free Trade Agreement (NAFTA). ***All practices with respect to block liquidation/block appraisement*** (liquidating one entry summary or some entry summaries for a periodic adjustment affecting many entry summaries) ***will cease and such post-entry adjustments will take place via the ACS Reconciliation Prototype.*** All importers may apply for this prototype. Details on the application process are explained below.

THE CONCEPT OF RECONCILIATION

When certain information (other than that related to the admissibility of merchandise) is not determinable at the time of entry summary, an importer may later provide Customs with that information on a Reconciliation. A Reconciliation is treated as an entry for purposes of liquidation, reliquidation, and protest.

A notice of intention to file a reconciliation ("Notice of Intent") identifies an undeterminable issue, transfers that issue to a Reconciliation and permits the liquidation of the underlying entry as to all issues other than those which are transferred to the Reconciliation. During this prototype, the importer will "flag" the underlying entries with an electronic indicator, which will serve as the Notice of Intent. By providing a Notice of Intent, an importer is requesting that a certain issue or group of issues be separated from the entry summary. The importer voluntarily requests and accepts that the issue(s) identified in the Notice of Intent remain open and outstanding. The importer remains responsible for filing a Reconciliation, and liable for any duties, fees, and taxes resulting from the filing and/or liquidation of the Reconciliation. The Notice of Intent creates an obligation on the importer to file the Reconciliation. Importers participating in this prototype will recognize

that the liquidation of the underlying entries pertains only to those issues not identified by the importer on the Notice of Intent.

Upon liquidation of any underlying entry summary, any decision by Customs entering into that liquidation, *e.g.*, classification, may be protested pursuant to 19 U.S.C. 1514. When the outstanding issue, e.g., value as determined by the actual costs, is later furnished in the Reconciliation, the Reconciliation will be liquidated. The liquidation of the Reconciliation will be posted to the Bulletin Notice of Liquidation, and may be protested pursuant to 19 U.S.C. 1514, but the protest may only pertain to the issue(s) flagged for reconciliation (*i.e.*, the protest may not re-visit issues previously liquidated on the underlying entry summary).

Under the statutory mandate of 19 U.S.C. 1484, the importer is responsible for using reasonable care in declaring at entry the proper value, classification and rate of duty applicable to imported merchandise. The public is reminded that the obligation to use reasonable care applies to all aspects of this prototype, including the filing and flagging of the underlying entries and the filing of the Reconciliation.

Inherent in the concept of reconciliation is the fact that, because certain issues are kept open pending filing of the Reconciliation, the information regarding these issues and the resulting liability for the duties, taxes and fees previously asserted by the importer may change when the Reconciliation is filed. Therefore, for the duration of this prototype, Customs will not accept drawback claims or drawback certificates on underlying entries flagged for reconciliation until the Reconciliation is filed with all duties, taxes and fees paid. In the case of a drawback claim and a reconciliation refund against the same underlying entries, the importer is responsible for ensuring that claims for refunds in excess of the duties paid are not filed with Customs and for substantiating how the separate refund requests apply to different merchandise.

PROTOTYPE OBJECTIVES

The Reconciliation team's objectives for this prototype are to:

1. Work with the trade community, other agencies, and other parties affected by this program in the design, conduct, and evaluation of the prototype;
2. Obtain experience through the prototype for use in the design of operational procedures, automated systems, and regulations; and
3. Implement reconciliation on a national level in conjunction with the Trade Compliance Redesign.

*Description of the ACS Reconciliation Prototype:*

1. Issues to be reconciled

The ACS Reconciliation Prototype will allow the following issues to be flagged for reconciliation: value, HTSUS heading 9802, NAFTA, and classification on a limited basis.

a. Value—The ACS Reconciliation Prototype is open to reconciliation of all value issues.

b. 9802—The issue of 9802 includes only the value aspect involved with this HTSUS provision, *e.g.*, reconciling the estimated to actual costs.

c. NAFTA—Reconciliation may be used as a vehicle to file post-importation refund claims under 19 U.S.C. 1520(d). NAFTA Reconciliations are subject to the obligations under 19 CFR part 181, subpart D. Presentation of the NAFTA Certificate of Origin to Customs is waived for the purposes of this prototype, but the filer must retain these documents, which shall be provided to Customs upon request. Filers are reminded that interest shall accrue from the date on which the claim for NAFTA eligibility is made (the date of the Reconciliation) to the date of liquidation or reliquidation of the Reconciliation.

The obligation opened by the Notice of Intent applies to all Reconciliations, including NAFTA, even if the particpant finally concludes it cannot file a valid 520(d) claim, in which instance the NAFTA Reconciliation would be filed with no change.

d. Classification—Classification issues will be eligible for reconciliation only when such issues have been formally established as the subject of a pending administrative ruling, protest or court action.

A Reconciliation of value, 9802 and/or classification shall be filed within 15 months of the date of the oldest entry summary flagged for and grouped on that Reconciliation. A Reconciliation may cover any combination of value, 9802 and classification. Should the issues of value, 9802 and/or classification on one entry summary be flagged for reconciliation, one Reconciliation covering all three issues will be filed.

A NAFTA Reconciliation must be filed within 12 months of the date of importation of the oldest entry summary flagged for and grouped on that Reconciliation. NAFTA Reconciliations will not be combined with other issues, because of NAFTA's unique nature and different due dates, and so that Customs may expedite the processing of such refunds.

2. Chain of events

a. Initial application—As part of an importer's application to participate in the ACS Reconciliation Prototype, the importer will provide information including descriptions of the specific issues to be reconciled, the merchandise and Harmonized Tariff Schedule (HTSUS) classification, and which ports the importer uses or intends to use.

b. Entries flagged for reconciliation—

i. Any entry summary (see below for eligible entry types) that is flagged for reconciliation must be filed via the Automated Broker Interface (ABI). An electronic indicator, or "flag," signifying that these entries are to be reconciled, must be provided at the header level. The flag designates that the indicated issue(s) for the entire entry summary (not just a specific line) is subject to reconciliation.

ii. For purposes of this prototype, the "flag" serves as the importer's Notice of Intent to file a Reconciliation.

iii. The importer must use reasonable care in filing the entry summary, including but not limited to declaring the proper value, classification

and rate of duty on the underlying entry summary. The importer must provide a good faith value estimate, and deposit the appropriate duties, taxes, and fees at time of entry summary.

iv. Entry summaries flagged for reconciliation will require a continuous bond, which must be accompanied by a rider. The rider shall read as follows:

> *By this rider to the Customs Form 301, No. _____, executed on _____, by _____, as principal, importer No. _____, and _____, as surety, code No. _____, which is effective on _____, the principal and surety agree that this bond covers all Reconciliations pursuant to 19 U.S.C. 1484(b) that are elected on any entries secured by this bond, and that all conditions set out in Section 113.62, Customs Regulations, are applicable thereto.*

The continuous bond obligated on the underlying entries, along with the rider, will be used to cover the Reconciliation.

v. All entries subject to one Reconciliation must be covered by one surety. Each Reconciliation must be covered by one surety, i.e., two sureties cannot cover the same Reconciliation.

vi. Entry summaries may be flagged for reconciliation until the close of the test period. Reconciliations may be filed after the close of the test period.

c. Liquidation of underlying entry summaries—Liquidation of the underlying entry summary will occur as with any entry summary. Importers who choose to participate in this prototype will recognize that the liquidation of the underlying entries pertains only to those issues not identified by the importer as reconcilable. Upon liquidation of the underlying entries, any decisions of the Customs Service entering into that liquidation can be protested pursuant to 19 U.S.C. 1514. The liquidation of the Reconciliation will be posted to the Bulletin Notice of Liquidation, and any decision of the Customs Service pertaining to that liquidation may also be protested (pursuant to 19 U.S.C. 1514).

d. Importer Electronically Transmits the Reconciliation via ABI—

i. When the importer has finalized the outstanding information, and has the answer to the issue in question, the filer will electronically (via ABI) transmit the Reconciliation to Customs. The Reconciliation will be a new entry type 09.

ii. Transmission of a Reconciliation for value, 9802 and/or classification must occur within 15 months of the date of the oldest entry summary flagged for and grouped on that Reconciliation. Transmission of a NAFTA Reconciliation must occur within 12 months of the date of importation of the oldest entry summary flagged for and grouped on that Reconciliation.

iii. Each Reconciliation will be limited to one importer of record, *i.e.*, the underlying entries and the Reconciliation must have the same importer of record.

iv. This prototype will allow up to 9,999 underlying entries per Reconciliation.

v. The importer must clearly document how the information in the Reconciliation was derived, and provide all supporting documentation to Customs when the Reconciliation is filed. The Reconciliation must include complete supporting documentation for the information provided, to substantiate the importer's claim. The supporting documentation must include details at the entry line level. Supporting documents may include, but are not limited to:

(a) CF 247—Cost Submission
(b) detailed line-level spreadsheets
(c) landed cost analysis sheets
(d) invoices, purchase orders, and contracts.

vi. While entry summaries may be flagged until the close of the test period, Reconciliations may be filed and liquidated after the closing date of the test.

vii. The structure of the Reconciliation will include a header, association file, and line item data:

(a) Header—The Reconciliation header will include the following data elements:

(i) Reconciliation entry number
(ii) Reconciliation entry type (09)
(iii) Reconciliation date (date of filing)
(iv) Issue(s) being reconciled
(v) IRS number
(vi) Surety code
(vii)Port of entry code (= processing port)
(viii) Summary date of oldest underlying entry (if the reconciliation issue is value, 9802 or classification)
(ix) Date of import of oldest underlying entry (if the reconciliation issue is NAFTA)
(x) The total of the original duties, taxes, and fees (fees broken out by "class code") which were deposited on the underlying entries
(xi) The total of the reconciled duties, taxes, and fees (fees broken out by "class code") which should have been paid for the underlying entries, had the complete information been available to the importer at the time of filing the underlying entries
(xii) The total amount of interest deposited on filing of the Reconciliation, if the filer elects to do so
(xiii) Comment field: This field is to be used to explain any details of the Reconciliation, *e.g.*, Assist declaration on part XYZ for the period 10/1/98–9/30/99.

(b) Association file—The association file will include the list of underlying entry numbers and the Reconciliation revenue adjustment, broken out by entry. The association file will consist of the following data elements:

(i) The underlying entry numbers and ports of entry which were previously flagged and grouped on this Reconciliation

(ii) The original amount of duties, taxes and fees (fees broken out by "class code") per underlying entry which were deposited at entry summary

(iii) The reconciled amount of duty, taxes and fees (fees broken out by "class code") which should have been paid for each of the underlying entries, had the complete information been available to the importer at the time of filing the underlying entry summary

(iv) If the Reconciliation results in additional duties due Customs, the filer may deposit interest at time of filing the Reconciliation. Interest must be calculated by and broken out to each underlying entry.

(c) Line item data—Aggregate line item data will be manually submitted via hard copy CF 7501. Each reconciliation line item will be consolidated for all of the underlying entries listed in the association file. Each combination of HTSUS, country of origin, SPI and month of release will require a separate line. The Reconciliation line data elements will include:

(i) HTS
(ii) SPI (if changed)
(iii) Country of origin
(iv) Quantity (if changed)
(v) Value
(vi) Month of release

The reconciled line information will be provided below the original information, as follows:

(Original) *HTS SPI C/O Quantity Value Release month*
(Reconciled) *HTS SPI C/O Quantity Value Release month*

e. Payment—If the Reconciliation results in a revenue change, Customs will issue one bill or refund per Reconciliation. If the Reconciliation results in additional duties due Customs, payment must be made via check, statement or Automated Clearing House at the time of filing the Reconciliation. The filer may deposit interest at time of Reconciliation filing. If the Reconciliation results in additional duties due the importer, Customs will issue a refund within 30 days of liquidation of the Reconciliation. Final interest will be assessed or refunded as appropriate.

f. Liquidation of Reconciliation—

i. The Reconciliation will be reviewed and liquidated, and one bill or refund issued if a revenue change is appropriate. Bill/refund amounts will be calculated against the duty as shown in the association file upon liquidation of the Reconciliation. Importers will recognize that there may be instances where no bill or refund is necessary. Interest will be calculated in accordance with 19 U.S.C. 1505.

ii. On a matter of dispute, the importer may follow normal protest procedures (pursuant to 19 U.S.C. 1514) with regard to the Reconciliation.

II. *Eligibility Criteria:*

1. Reconciliation is to be used to group entries together for a common, outstanding issue. Entries flagged for reconciliation which have the same outstanding information should all be grouped on one Reconciliation, *e.g.*, entries flagged for reconciliation over a one year period awaiting finalization of assist information should be grouped on one Reconciliation where the assist information is provided.

2. Adequate bond coverage must exist for the Reconciliation.

3. Participants must be capable of filing the underlying entry and Reconciliation information electronically, via the Automated Broker Interface (ABI).

4. The following entries types are eligible for reconciliation under this prototype:

a. Entry type 01: Free and dutiable consumption entries
b. Entry type 02*: Quota/visa consumption entries
c. Entry type 03*: Antidumping/ Countervailing duty (AD/CVD) consumption entries
d. Entry type 06: Foreign Trade Zone consumption entries
e. Entry type 07*: Quota/visa and AD/CVD combination consumption entries

*Quota and AD/CVD entries may be reconciled for value, classification, 9802 and/or NAFTA. The issues of AD/CVD final rate and scope determination, quota category or any admissibility issue are **not** eligible reconciliation issues under this prototype.

5. The underlying entries flagged for a Reconciliation may be filed at any port, including any combination of ports.

6. The Reconciliation and supporting documentation may be filed at any port location. Certain ports will be established as reconciliation processing ports. The ABI transmission of the Reconciliation must reflect one of the Customs-identified processing ports in the port code field. Customs will identify and announce the reconciliation processing ports in the Federal Register.

Utilizing the logic of the Remote Location Filing programming, participant profiles will be established in ACS. Participants must identify those locations from where the ABI transmissions will be filed.

7. Participants must agree to participate in the evaluation of this test.

APPLICATION TO PARTICIPATE IN THE ACS RECONCILIATION PROTOTYPE

This prototype is open to all importers. As stated above, this prototype will serve as the exclusive authority to reconcile entries, outside of any other Customs-designated prototypes. This notice requests importers to apply for participation in this prototype by submitting the following information:

1. Importer name and IRS number
2. Broker name(s) and filer code(s)
3. Surety name(s) and surety code(s)
4. Bond coverage (reconciliation rider mentioned above)

A copy of the rider and identification of the port in which the continuous bond and rider are filed must be included in the application.

5. Commodities covered under the Reconciliation
6. Processing port which will be used
7. Port(s) at which underlying entries and Reconciliation will be filed
8. Port location from where ABI transmission is sent (may be same as #7)
9. Number of entries anticipated to be covered by the Reconciliation
10. Description of specific issue(s) which will be reconciled
11. Point of contact and telephone number
12. Any comments on prototype participation

The application may be submitted by the importer's broker and/or attorney, if duly authorized. This information should be submitted to Ms. Shari McCann, Reconciliation Team, U.S. Customs Service, 1301 Constitution Ave, NW, Room 1315, Washington, DC, 20229. A subsequent notice will be published in the Federal Register to announce the opening date of the application period. By applying to participate in this test, the importer is agreeing to participate pursuant to the terms of the test as defined in this notice.

Applications may be submitted throughout the duration of the prototype. Applicants will be notified in writing of their acceptance or denial into the prototype. An applicant who has been denied participation in the prototype may re-apply after 30 days of the notice of denial.

Interested candidates should note that participation in this test will not constitute confidential information, and that lists of participants will be made available on the Customs Electronic Bulletin Board.

### Misconduct Under Prototype

If a filer attempts to submit data relating to prohibited merchandise, abuses reconciliation by using it when the reconciliation issue is not truly undeterminable at time of entry summary; submits entry types not authorized for reconciliation; is consistently late in filing the Reconciliation or depositing the duties, fees and taxes; fails to supply Customs with sufficient supporting documentation for the Reconciliation; is habitually delinquent in the payment of bills from Customs; or otherwise fails to follow the procedures outlined herein, or applicable laws and regulations, then the filer may be subject to liquidated damages, penalties and/or other administrative sanctions and/or prevented from participation in future prototypes.

### Regulatory Provisions Suspended

Certain requirements of § 113.62 of the Customs Regulations (19 CFR 113.62), pertaining to basic importation and entry bond conditions, will be suspended during this prototype. Certain provisions in Parts 141 and 142 of the Customs Regulations (19 CFR 141 and 19 CFR 142), pertaining to entry, and of Part 159 of the Customs Regulations

(19 CFR Part 159), pertaining to liquidation of duties, will also be suspended during this prototype.

Absent any specified alternate procedure, the current regulations apply.

III. *Test Evaluation Criteria:*

Once the initial comment period has closed, Customs will review all public comments received concerning any aspect of the test program or procedures, answer any questions in light of those comments, and establish baseline measures and evaluation methods and criteria. Interim evaluations of the prototype will be published on the Customs Electronic Bulletin Board, and the results of the final prototype evaluation will be published in the Federal Register as required by 19 CFR 101.9(b). The following evaluation methods and criteria have been suggested:

1. Baseline measurements to be established through dataqueries and questionnaires
2. Reports to be run through use of dataquery throughout the prototype
3. Questionnaires from both trade participants and Customs to be used before, during and after the prototype period.

Customs may assess any or all of the following evaluation criteria from both Customs and the trade participants:

1. Workload impact (workload shifts/volume, cycle times, etc.)
2. Cost savings (staff, interest, issuance of fewer checks or bills, tracking refunds/bills, reduction in contingent liabilities, etc.)
3. Policy and procedure accommodation
4. Trade compliance impact
5. Problem resolution
6. System efficiency
7. Operational efficiency
8. Other issues identified by the participant group.

Customs will request that test participants be active in the evaluation, identifying costs and savings experienced in this prototype.

Dated: September 25, 1997.

ALBERT W. TENNANT,
*Acting Assistant Commissioner,*
*Office of Field Operations.*

[Published in the Federal Register, September 30, 1997 (62 FR 51181)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
*Washington, DC, September 24, 1997.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN DURANT,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

## PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CERTAIN ARTIFICIAL FOOD SWEETENER (ISOMALT)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NYRL) 849851, dated March 14, 1990, concerning the classification of a product known as Isomalt.

DATE: Comments must be received on or before November 7, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Commercial Rulings Division, located at the Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may also be inspected at the Office of Regulations and Rulings.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch, Office of Regulations and Rulings (202) 927–1109.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C 1625), as amended by section 623 of Title VI (Customs Modernization) of the

North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a product known as Isomalt, used as an artificial food Sweetener, consisting of approximately 50 percent of sorbitol, and 50 percent mannitol.

Customs intends to revoke NYRL 849851, Attachment A to this document, to reflect the proper classification in subheading 2106.90.9998, HTSUS.

Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 960203, revoking NYRL 849851, and classifying the product in subheading 2106.90.9998, HTSUS, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 19, 1997.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
*New York, NY, March 14, 1990.*

CLA38:S:N:N1:235 849851
Category: Classification
Tariff No. 3823.90.5050

MS. LINDA PREND
AIR IMPORT MANAGER
SCHENKER'S INTERNATIONAL FORWARDERS, INC.
*123 Sivert Court*
*Bensenville, IL 60106*

Re: The tariff classification of Isomalt, a mixture of sorbitol and mannitol from West Germany.

DEAR: MS. PREND:

In your letter dated February 16 1990, you requested a tariff classification ruing on behalf of your client, Irwin Services DBA Palatinit.

According to your letter Isomalt should be classified in 2905.49.2000 HTS. Please review note 1(a) to Chapter 29 HTS. It specifies that only single chemically defined compounds are classifiable in Chapter 29. Isomalt based on Mr. Irwin's statement, is composed of 50% sorbitol and 50% mannitol. Each are separate chemically defined compounds.

Therefore the applicable subheading for Isomalt (CAS number 64519–82–0) will be 3823.90.5050, Harmonized Tariff Schedule of the United States (HTS), which provides for chemical mixtures not elsewhere provided for. The rate of duty will be 5 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
*Area Director,*
*New York Seaport.*

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
*Washington, DC.*

CLA–2 RR:CR:GC 960203K
Category: Classification
Tariff No. 2106.90.9998

MS. LINDA PREND
AIR IMPORT MANAGER
SCHENKER'S INTERNATIONAL FORWARDERS, INC.
*123 Sivert Court*
*Bensenville, IL 60106*

Re: Tariff Classification of Isomalt: Revocation of New York Ruling Letter (NYRL) 849851, Dated March 14, 1990

DEAR MS. PREND:

In response to your letter of February 16, 1990, on behalf of your client, Irwin Services, D.B.A. Palatinit, the Customs Service issued NYRL 849851, dated March 14, 1990, which held that a product known as Isomalt, was classified in subheading 3823.90.5050 Harmonized Tariff Schedule of the United States (HTSUS) (1990), which provided for other chemical mixtures not elsewhere provided for. This provision has been redesignated as subheading 3824.90.90, HTSUS, with a 1997 general rate of duty of 5 percent *ad valorem*, and subject to special provisions in subheadings 9901.00.50 and 52, HTSUS, not applicable to the merchandise in question. This letter is to inform you that NYRL 849851 no longer reflects the views of the Customs Service. The following represents our position.

*Facts:*

The Isomalt product from West Germany in the 1990 ruling contained a mixture of 50 percent of sorbitol and 50 percent mannitol (used as an artificial food sweetener).

*Issue:*

The issue is whether the product, Isomalt, as a mixture of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs, is excluded from coverage in Chapter 38, HTSUS, by virtue Legal Note 1(6), of Chapter 38.

*Law and Analysis:*

Legal Note 1.(b) Chapter 38, HTSUS, states that Chapter 38 does not cover "mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs (generally heading No. 2106)."

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. In 1993, the General Notes to Chapter 38, of the EN were amended to clarify the term "foodstuffs or other substances with nutritive value", of Legal Note 1.(b), as follows:

> For the purposes of Note 1 (b) to the Chapter, the expression "foodstuffs or other substances with nutritive value" principally includes edible products of Sections I to IV.

The expression "foodstuffs or other substances with nutritive value" also includes certain other products, for example, products of Chapter 28 used as mineral supplements in food preparations, sugar alcohols of heading 29.05, essential amino acids of heading 29.22, lecithin of heading 29.23, provitamins and vitamins of heading 29.36, sugars of heading 29.40, animal blood fractions of heading 30.02 for use in food preparations, casein and caseinates of heading 35.01, albumins of heading 35.02, edible gelatin of heading 35.03, edible protein substances of heading 35.04, dextrins and other edible modified starches of heading 35.05, sorbitol of heading 38.24, edible products of Chapter 39 (such as amylopectin and amylose of heading 39.13). It should be noted that this list of products is simply illustrative and should not be taken to be exhaustive.

The mere presence of "foodstuffs or other substances with nutritive value" in a mixture would not suffice to exclude the mixture from Chapter 38, by application of Note 1(b). The mixtures which are excluded from Chapter 38 by virtue of Note 1(b) are those which are of a kind used in the preparation of human foodstuffs.

In following the explanation in the EN, we conclude that sorbitol classified in heading 3824, and mannitol (sugar alcohols) classified in heading 2905 are "foodstuffs or other substances with nutritive value" that are excluded from coverage in Chapter 38. Accordingly, the product, Isomalt is classified in subheading 2105.90.9998, HTSUS, as other food preparations not elsewhere specified or included, with a 1997 general rate of duty of 8.2 percent *ad valorem*.

*Holding:*

The product Isomalt as described above is classified as other food preparations not elsewhere specified or included, in subheading 2105.90.9998, HTSUS, with a 1997 general rate of duty of 8.2 percent *ad valorem*.

NYRL 849851, dated March 14, 1990, is revoked.

JOHN DURANT,
*Director,*
*Commercial Rulings Division.*

## PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO THE DATE OF ENTRY OF MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of entry ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the date of entry of certain merchandise. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before November 7, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: International Trade Compliance Division, 1301 Constitution Avenue, NW., Franklin Court, Washington, D.C. 20229. Comments submitted may be inspected at the Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW., suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Craig Clark, Entry and Carrier Rulings Branch, (202) 482–6940.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the date of entry of certain merchandise.

In HQ 225410, dated September 20, 1994, we found that when merchandise is released, pursuant to 19 CFR 141.68 (a), in a time period when it is not under any quota restrictions, and entry summary is subsequently filed when the merchandise is subject to a tariff rate quota, the date of entry is the date that the entry summary was filed in proper form, with estimated duties attached (unless ABI procedures are used), pursuant to 19 CFR 141.68(d). (See "Attachment A" to this document.) In such a situation, therefore, the merchandise would be subject to the tariff rate quota.

After further analysis of HQ 225410, we believe that the decision was incorrect. In the situation described above, we believe that the date of entry is determined by 19 CFR 141.68 (a) and not 19 CFR 141.68(d). Since the date of entry would be prior to the opening of the quota period, the merchandise would not be subject to tariff rate quota.

Customs intends to revoke HQ 225410 to reflect the proper date of entry in the situation described above. Before taking this action, consideration will be given to any written comments timely received. The proposed ruling revoking HQ 225410 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 22, 1997.

JOHN DURANT,
*Director,*
*International Trade Compliance Division.*

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
*Washington, DC, September 20, 1994.*

ENT–1–03/ENT–5–01–CO:R:C:E 225410 PH
Category: Entry

MR. FREDERICK D. LAWRENCE
DISTRICT DIRECTOR OF CUSTOMS
*9 North Grand Avenue*
*Nogales, AZ 85621*

Re: Date of entry; immediate delivery; quota; North American free trade agreement act (NAFTA); 19 CFR 141.68.

DEAR MR. LAWRENCE:

In your letter of May 6, 1994, you request advice on the applicability of 19 CFR 141.68 regarding the date of entry to the importation of eggplant in your district. One of the questions you raise is whether NAFTA and the implementing statute and regulations change any at the entry rules for Mexican or Canadian originating goods. As you can see from a review of the interim regulations pertaining to NAFTA (T.D. 94–1) and the NAFTA Implementation Act (Public Law 103–182), the effects of NAFTA and its implementing statute and regulations are extremely broad. Therefore, we are not attempting to answer, in this ruling, that general question. However, in our ruling, we will incorporate changes effected by NAFTA and its implementing statute and regulations which affect the specific situation you describe and the statutes and regulations applicable to that situation.

Our ruling follows.

*Facts:*

You state that on the Mexican/United States border all produce is normally released under the immediate delivery procedures. Before implementation of NAFTA, when a vegetable or fruit changed from a lower duty rate to a higher duty rats, the broker would request that for a week to 10 days before the change, the particular product be released under the entry procedures in 19 CFR 141.68(a).

You state that the general rate of duty for eggplant was increased on April 1, 1994, but that under NAFTA eggplant also went from a non-quota to a tariff rate quota (citing subheadings 0709.30.4000, 0709.30.2000, 9906.07.35, and 9906.07.36, Harmonized Tariff Schedule of the United States (HTSUS)). You state that all eggplant entered after April 1 is considered to be subject to a tariff rate quota and reported as such but, since the quota is not an absolute one, eggplant may be released through an immediate delivery or entry procedures in 19 CFR 141.68(a).

You state that in the middle of March, in anticipation of the April change in duty, some brokers in your district asked that for the last week in March all of their eggplant releases be released under 19 CFR 141.68(a). Eggplant subject to such requests was released in March and the broker filed the entry summary in April with a March date of entry and a free rate of duty.

*Issues:*

(1) In a situation such as that described in the FACTS portion of this ruling, when merchandise is released under 19 CFR 141.68(a) in a time period when the merchandise is not under any quota restrictions but the entry summary is subsequently filed when the merchandise is subject to a tariff rate quota, what is the date of entry?

(2) In the situation described in ISSUE (1), must the merchandise be entered under the HTSUS tariff rate quota number, or can the importer enter the merchandise at the lower rate but still have it be subject to the quota?

*Law and Analysis:*

The effective rates of duty for merchandise imported into the United States are provided for in 19 U.S. C. 1315. That statute, as recently amended by section 633 of title VI of the NAFTA Implementation Act (Public Law 103–182; 107 Stat. 2057, 2198), provides, in pertinent part, that:

> (a) Except as otherwise specially provided for, the rate or rates of duty imposed by or pursuant to this chapter or any other law on any article entered for consumption or

withdrawn from warehouse for consumption shall be the rate or rates in effect when the documents comprising the entry for consumption or withdrawal from warehouse for consumption and any estimated or liquidated duties then required to be paid have been deposited with the Customs Service by written, electronic or such other means as the Secretary by regulation shall prescribe except that—

(1)* * *

(2) any article which is not subject to a quantitative or tariff-rate quota and which is covered by an entry for immediate transportation made at the port of original importation under [19 U.S.C. 1552], if entered for consumption at the port designated by the consignee, or his agent, in such transportation entry without having been taken into the custody of the appropriate customs officer under [19 U.S.C. 1490], shall be subject to the rate or rates in effect when the transportation entry was accepted at the port of original impartation * * *.

Customs Regulations issued under this statute and/or pertinent to the issues under consideration are set forth, in part, below:

Under 19 CFR 141.69, "[t]he rates of duty applicable to merchandise shall be the rates in effect at the time of entry, as specified in § 141.68, except [in cases not pertinent in this case] * * *."

Section: 141.68, referred to above, provides the time of entry for merchandise imported into the United States. Subsection (a) of section 141.68 provides the general rule for establishing the time of entry when entry documentation is filed without an entry summary and subsection (b) of section 141.68 provides the rule for establishing the time of entry when an entry summary serves as both the entry documentation and entry summary. Subsection (c) specifically provides for merchandise released under the immediate delivery procedure (the time of entry is the time the entry summary is filed in proper form, with estimated duties attached). Subsection (d) specifically provides for the time of entry for quota-class merchandise (i.e., "[t]he time of entry for quota-class merchandise shall be the time of presentation or the entry summary or withdrawal for consumption in proper form, with estimated duties attached or, if the entry/entry summary information and a valid scheduled statement date * * * have been successfully received by Customs via [ABI], without estimated duties attached, as provided in [19 CFR 132.11a]").

Under 19 CFR 132.1(d), "presentation" is defined for purposes of the Customs Regulations pertaining to quota as "the delivery in proper form to the appropriate Customs officer of * * * [a]n entry summary for consumption, which shall serve as both the entry and the entry summary, with estimated duties attached * * * or * * * [a]n entry summary for consumption, which shall serve as both the entry and the entry summary, without estimated duties attached [if ABI procedures, see above, are used] or * * * [a] withdrawal for consumption with estimated duties attached." The time of presentation of an entry/entry summary for quota purposes is the time of delivery in proper form of the above-described documents (i.e., the documents listed in the definition of "presentation") (see 19 CFR 132.11a). Under 19 CFR 132.1(e), "quota-class merchandise" is defined as "any imported merchandise subject to limitations under an absolute or a tariff-rate quota."

In interpreting these provisions, we are guided by the rule of interpretation that a general rule will not be held to apply to a matter specifically dealt with in another part of the same provision *(Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932); *Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 524 (1989)). In this case, in 19 CFR 141.68(d), there is a specific rule pertaining to quota-class merchandise (we note that such merchandise includes merchandise subject to limitations under a tariff-rate quota as well as an absolute quota (19 CFR 13.1(e))). Under section 141.68(d), the date of entry for quota-class merchandise is the time of presentation of the entry summary or withdrawal for consumption in proper form with estimated duties attached (unless ABI procedures are used, in which case estimated duties need not be attached). As the more specific provision, this provision prevails over the general provision in 19 CFR 141.68(a) when the merchandise entered is quota-class, merchandise.

We note that this interpretation is consistent with the Customs Regulations relating to quota (19 CFR Part 132) which treat the time of presentation as the tile of presentation of the entry/entry summary in proper form, with estimated duties attached (see 19 CFR 132.1(d) and 132.11a, described above). (See also, in this regard, T.D. 78–228.)

In the situation you describe, merchandise (eggplant) from Mexico (for purposes of this ruling, we assume that the eggplant qualifies as a good of Mexico under the terms of NAFTA) was released by Customs before April 1, 1994, but the entry summary for the merchan-

dise was filed in April. Under the HTSUS, eggplant entered during the period from April 1 to June 30, inclusive, in any year is subject to a tariff-rate quota (subheadings 0709.30.20, 9906.07.35, 9906.07.36, HTSUS, and U.S. Note 12 to subchapter VI of chapter 99, HTSUS). Section 141.68(d) of the Customs Regulations specifically provides, in pertinent part, that the date of entry for quota-class merchandise is the time of presentation of the entry summary in proper form with estimated duties attached (unless ABI procedures are used, in which case duties need not be attached). Therefore, the date of entry for this merchandise is the date the entry summary was filed and since that was in April, the merchandise is subject to the tariff-rate quota. Since the date of entry of the merchandise is April, the merchandise must be entered under the HTSUS tariff provision applicable at that time (i.e., for eggplant which qualifies as a good of Mexico under the terms of NAFTA, subheading 0709.30.2000/9906.07.35 or 0709.30.2000/9906.07.36, depending on whether the merchandise is within the quantitative limits specified in U.S. Note 12 to subchapter VI of chapter 99).

*Holding:*

(1) In a situation such as that described in the FACTS portion of this ruling, when merchandise is released in a time period when the merchandise is not under any quota restrictions but the entry summary is subsequently filed when the merchandise is subject to a tariff rate quota, the date of entry is the date that the entry summary was filed in proper form, with estimated duties attached (unless ABI procedures are used, in which case duties need not be attached).

(2) In the situation described in ISSUE (1), the merchandise must be entered under the HTSUS tariff provision (for eggplant entered between April 1 and June 30, inclusive, which qualifies as a good of Mexico under the terms of NAFTA, subheading 0709.30.2000/9906.07.35, or 0709.30.2000/9906.07.36, depending on whether the merchandise is within the quantitative limits specified in U.S. Note 12 to subchapter VI of Chapter 99, HTSUS), applicable at the date of entry (see above).

The Office of Regulations and Rulings will take steps to make this decision available to Customs Personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, Freedom of Information Act and other public access channels 60 days from date of this decision.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
*Washington, DC.*

ENT–1–03/ENT–5–01/QUO–1–RR:IT:EC 114067 CC
Category: Entry

PORT DIRECTOR OF CUSTOMS
*9 North Grand Avenue*
*Nogales, AZ 85621*

Re: Revocation of HQ 225410; Date of Entry; 19 CFR § 141.68; Tariff Rate Quota.

DEAR SIR OR MADAM:

Headquarters Ruling (HQ) 225410, dated September 20, 1994, was issued in response to your request for advice concerning the date of entry for produce released prior to the opening of a quota period. You used as an example the importation of eggplant in your district. We found in that decision that when the merchandise was released in a time period when it was not under any quota restrictions, and entry summary is subsequently filed when the merchandise is subject to a tariff rate quota, the date of entry is the date that the entry summary was filed in proper form, with estimated duties attached (unless ABI procedures are used). Therefore, the eggplant was found to be subject to quota. We have reviewed HQ 225410 and believe it is incorrect.

*Facts:*

It was stated in your request that on the Mexican/United States border all produce is normally released under the immediate delivery procedures. Before implementation of NAFTA, when a vegetable or fruit changed from a lower duty rate to a higher duty rate, the broker would request that for a week to 10 days before the change, the particular product be released under the entry procedures in 19 CFR § 141.68(a).

The general rate of duty for eggplant was increased on April 1, 1994, but that under NAFTA eggplant also went from a non-quota to a tariff rate quota (citing subheadings 0709.30.4000, 0709.30.2000, 9906.07.35, and 9906.07.36, Harmonized Tariff Schedule of the United States (HTSUS)). You stated that all eggplant entered after April 1 is considered to be subject to a tariff rate quota and reported as such but, since the quota is not an absolute one, eggplant may be released through an immediate delivery or entry procedures in 19 CFR § 141.68(a).

In the middle of March, in anticipation of the April change in duty, some brokers in your (then) district asked that for the last week in March all of their eggplant releases be released under 19 CFR § 141.68(a). Eggplant subject to such requests was released in March, and the broker filed the entry summary in April with a March date of entry and a free rate of duty.

*Issue:*

When merchandise is released without filing the entry summary, pursuant to 19 CFR § 141.68(a), in a time period when the merchandise is not under any quota restrictions, but the entry summary is subsequently filed when the merchandise is subject to a tariff rate quota, what is the date of entry.

*Law and Analysis:*

The effective rates of duty for merchandise imported into the United States are provided for in 19 U.S.C. § 1315. That statute, as amended, provides, in pertinent part, the following:

> (a) Except as otherwise specially provided for, the rate or rates of duty imposed by or pursuant to this chapter or any other law on any article entered for consumption or withdrawn from warehouse for consumption shall be the rate or rates in effect when the documents comprising the entry for consumption or withdrawal from warehouse for consumption and any estimated or liquidated duties then required to be paid have been deposited with the Customs service by written, electronic or such other means as the Secretary by regulation shall prescribe, except that—
>
> (1) * * *
>
> (2) * * *
>
> (3) any article for which duties may, under section 1505 of this title, be paid at a time later than the time of making entry shall be subject to the rate or rates in effect at the time of entry.

19 U.S.C. § 1505(a) provides, in pertinent part, "[u]nless merchandise is entered for warehouse or transportation, or under bond, the importer of record shall deposit with the Customs Service at the tine of making entry or at such later time as the Secretary may prescribe by regulation, the amount of duties and fees estimated to be payable thereon. * * *

Customs Regulations issued pursuant to, or that are relevant to, the above statutes, are set forth, in part, below. 19 CFR § 141.69 provides, "[t]he rates of duty applicable to merchandise shall be the rates in effect at the time of entry, as specified in § 141.68, except [in cases not pertinent in this case] * * *"

As stated in HQ 225410, 19 CFR § 141.68 provides the time of entry for merchandise imported into the United States. Subsection (a) of section 141.68 provides the general rule for establishing the time of entry when entry documentation is filed without an entry summary, and subsection (b) of section 141.68 provides the rule for establishing the time of entry when an entry summary serves as both the entry documentation and entry summary. Subsection (c) specifically provides for merchandise released under the immediate delivery procedure (the time of entry is the time the entry summary is filed in proper form, with estimated duties attached). Subsection (d) specifically provides for the time of entry for quota-class merchandise (i.e., "[t]he time of entry for quota-class merchandise shall be the time of presentation of the entry summary or withdrawal for consumption in proper form, with estimated duties attached or, if the entry/entry summary information and a valid scheduled statement date * * * have been successfully received by Customs via [ABI], without estimated duties attached, as provided in [19 CFR § 132.11a]").

19 CFR § 142.12 provides the following:

> (b) If the importer is not required to file the entry summary documentation at the time of entry under the provisions of § 42.13, or if he does not elect to do so, the entry summary documentation shall be filed, with estimated duties attached, within 10 working days after the time of entry.

In HQ 225410 we stated, "(i]n interpreting these provisions, we are guided by the rule of interpretation that a general rule will not be held to apply to a matter specifically dealt with in another part of the same provision." We found that because 141.68(d) specifically applies to the date of entry for quota class merchandise, it applied to the factual situation presented. Consequently, we concluded that in application of § 141.68(d), the date of entry for the eggplant was the date of presentation: the date entry summary was filed with estimated duties attached (unless ABI procedures are used).

After reconsideration of that decision, we believe it is incorrect. Section 141.68(d) equates the date of entry for quota-class merchandise as the time of presentation. Presentation is only applicable to quota-class merchandise. The time of presentation is the delivery to Customs in proper form of the entry summary with estimated duties attached (unless ABI procedures are used). The time of presentation is important because it determines quota-status, and becomes particularly important when a quota becomes nearly filled.

Thus, 19 CFR § 141.68(d) applies only to quota class merchandise and serves to reiterate what the time of presentation is for quota-class merchandise. To determine that 141.68(d) applies, it must first be determined that the merchandise in question is subject to quota. To determine whether merchandise is subject to quota, it must be determined what is the date of entry for the merchandise, and what quota restraints apply at that time.

As stated above, 19 CFR § 141.68(a) applies to a situation in which entry documentation is filed without entry summary. Depending on the particular situation, 19 CFR § 141.68(a) provides the date of entry is the time (1) Customs authorizes release of the merchandise, (2) the entry documentation is filed, or (3) the time the merchandise arrives in the port limits. Entry summary, with estimated duties attached, is required to be filed within 10 working days of the date of entry. Absent any applicable law or regulation that states the date of entry is the date the entry summary is filed for a class of merchandise that becomes subject to quota after it is released with entry documentation having been filed, and the date of entry is prior to the opening of the quota period pursuant to 19 CFR § 141.68(a), then 19 CFR § 141.68(a) must apply. In this situation, section 141.68(d) does not apply because the merchandise is not considered quota-class merchandise.

Consequently, for the example of the importation of eggplant, the date of entry would be in March when the entry documentation was filed and the eggplant was released, pursuant to section 141.68(a). The date the entry summary was filed, in April, would not serve as the date of entry. Thus, the eggplants should not have been subject to quota since that class of merchandise did not have any quota constraints until April 1. Since duties are determined on the date of entry, the applicable subheadings would be those that applied to the eggplant in March.

*Holding:*

When merchandise is released without filing the entry summary, pursuant to 19 CFR § 141.68(a), in a time period when the merchandise is not under any quota restrictions, but the entry summary is subsequently filed when the merchandise is subject to a tariff rate quota, the date of entry is not when the entry summary is filed, but the date of entry provided by 19 CFR § 141.68(a). The merchandise would not be subject to quota, and the dutiable rate would be that applicable at the date of entry as provided by 19 CFR § 141.68(a).

HQ 225410 is revoked.

JERRY LADERBERG,
*Acting Chief,*
*Entry and Carrier Rulings Branch.*

## MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CHEF COATS

AGENDA :U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of chef coats. The merchandise is three styles of unisex chef coats consisting of 100 percent woven cotton fabric. It has a full-front opening with a double row of fabric knot buttons that can be buttoned either left over right or right over left. The garments are hip-length with mandarin collars and mandarin styling, and long or short sleeves, depending on the style. Notice of the proposed modification was published on August 20, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 34.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after December 8, 1997.

FOR FURTHER INFORMATION CONTACT: Deann Schaffer, Textiles Branch (202) 482–7050.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

On August 20, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, Number 34, a notice of a proposal to modify NY 806883, dated February 27, 1995, concerning the classification of chef coats. The merchandise in issue was classified under subheading 6211.42.0081, Harmonized Tariff Schedule of the United States Annotated, HTSUSA, as "Track suits, ski-suits and swimwear; other garments: Other garments, Women's or girls': Of cotton: other."

No comments were received in response to our notice of intent to modify NY 806883.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NY 806883 to reflect the proper classification under subheading 6206.30.3040, HTSUSA, which provides for, "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other:

Other: Other: Women's." HQ 960333 modifying NY 806883 is set forth as an attachment to this document.

Dated: September 24, 1997.

JOHN DURANT,
*Director,*
*Commercial Rulings Division.*

[Attachment]

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[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
*Washington, DC, September 24, 1997.*

CLA-2 RR:TC:TE 960333
Category: Classification
Tariff No. 6206.30.3040

SANDLER, TRAVIS & ROSENBERG, P.A.
*505 Park Avenue*
*New York, NY 10022-1106*

Re: Classification of chef coats from El Salvador; Heading 6211; Heading 6206.

DEAR SIR/MADAM:

This is in reference to a ruling issued to you by the former Area Director, New York Seaport, New York Ruling (NY) 806883, dated February 27, 1995, concerning the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of several chef coats. We have reviewed this ruling in light of the publication of Headquarter's Ruling (HQ) 959974, dated April 7, 1997, HQ 959817, date April 7, 1996, and NY B80112, dated December 24, 1996. Based upon these rulings, we have determined that NY 806883 is partially incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY 806883 was published on August 20, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 22.

*Facts:*

In NY 806883, Customs classified three styles of chef coats consisting of 100 percent woven cotton fabric. Styles 147, 151 and 17484 were identified to be unisex chef coats featuring a full front opening with a double row of fabric knot buttons that can be buttoned either left over right or right over left. The garments are hip-length with mandarin collars and mandarin styling, and long or short sleeves, depending on the style.

*Issue:*

What is the tariff classification of the chef coats?

*Law and Analysis:*

In NY 806883, Customs classified the chef coats under subheading 6211.42.0081, HTSUSA, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton: Other.

In HQ 959974, HQ 959817 and NY B80112, Customs determined that the proper classification for these types of chef coats is under subheading 6206.30.3040, HTSUSA, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other: Other: Women's". This determination was based upon the following analysis.

The classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification shall be determined

according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may be applied, taken in order.

In HQ 959974, HQ 959817, and NY B80112, Customs addressed the classification of the chef coat under heading 6211, HTSUSA, and heading 6206, HTSUSA. Customs determined the classification based upon previous rulings and the Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), which although not legally binding, are the official interpretation of the tariff at the international level.

The EN to Heading 6114 concerning other garments apply *mutatis mutandis,* to the articles of heading 6211, HTSUSA. The applicable EN to heading 6114, HTSUSA, provides that "this heading covers knitted or crocheted garments which are not included more specifically in the preceding headings of this chapter". Applying this language to heading 6211, HTSUSA, denotes that Heading 6211, HTSUSA, is not appropriate if the garments at issue are covered more specifically in preceding headings. The applicable EN to heading 6211, HTSUSA, further states the following:

The heading includes, inter alia:

(1) Aprons, boiler suits (coverall), smocks and other protective clothing of a kind worn by mechanics, factory workers, surgeons, etc.

(2) Clerical or ecclesiastical garments and vestments (e.g., monks' habits, cassocks, copes, soutanes, surplices).

(3) Professional or scholastic gowns and robes.

(4) Specialized clothing for airmen, etc. (e.g., airmen's electrically heated clothing).

(5) Special articles of apparel used for certain sports or for dancing or gymnastics (e.g., fencing clothing, jockeys' silks, ballet skirts, leotards).

General notes to the EN to Chapter 62 state, in part, "Shirts and shirt blouses are garments designed to cover the upper part of the body, having long or short sleeves and a full front opening starting at the neckline."

The application of these two headings to other garments has been previously reviewed by this office. For instance, in Headquarters Ruling Letter (HQ) 959136, dated November 27, 1996, this office classified a hospital issue scrub type top in heading 6206, HTSUSA, determining that it was not suitable for use as protective clothing. Customs pointed out in this ruling that "the protective garments properly classifiable under heading 6211, HTSUSA, are of a kind that have special design features or unique properties that distinguish them from other garments that are not used for protective purposes." Several examples of this follow. In HQ 952934, dated July 19, 1993, Customs classified coveralls designed to protect the wearer from microwave radiation under Heading 6211, HTSUSA. The coveralls at issue in that case were composed of textile fabric and stainless steel fibers. In HQ 084132, dated July 6, 1989, Customs classified a lab coat made of 100 percent polyester woven fabric with carbon fiber woven into it as an antistatic component under Heading 6211, HTSUSA. The lab coat was designed for wear in the electronics industry.

The chef coats at issue are classifiable in accordance with those previously ruled upon in that they do not have any special design features or unique properties that make them subject to or suitable for use as protective clothing nor do they fall within any of the other listed items in the EN to heading 6114. The chef coats are specifically provided for under heading 6206, HTSUSA, thus classification under heading 6211, HTSUSA, is not required.

*Holding:*

The chef coats, referenced style numbers 147, 151 and 17484, are classified in subheading 6206.30.3040, HTSUSA, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other: Other: Women's". The applicable rate of duty is 16.2 percent *ad valorem* and the textile category is 341. NY 806883 is modified with respect to the chef coats referenced above. With respect to the *chef jacket,* also, classified in NY 806883, their classification under subheading 6203.32.2040, HTSUSA, remains unchanged.

NY 806883, dated February 27, 1995, is modified.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
*Director,*
*Commercial Rulings Division.*

# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

Gregory W. Carman

*Judges*

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

*Senior Judges*

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

*Clerk*

Raymond F. Burghardt

# Decisions of the United States Court of International Trade

NOTE: Purusant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on December 18, 1996 is being published by the Clerk's Office as Slip Op. 96–202 on September 17, 1997.

(Slip Op. 96–202)

NEC CORP. AND HNSX SUPERCOMPUTERS, INC., PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS, AND CRAY RESEARCH, INC., DEFENDANT-INTERVENOR

Court No. 96–10–02360

[Defendant's motion to dismiss denied.]

(Decided December 18, 1996)

*Paul, Weiss, Rifkind, Wharton, & Garrison (Robert E. Montgomery, Jr., Terence J. Fortune, Robert P. Parker, David J. Weiler)* for Plaintiffs.

*Frank W. Hunger,* Assistant Attorney General; *David M. Cohen,* Director; *Jeffrey M. Telep,* Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Patrick W. Gallagher,* Attorney-Advisor, International Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for Defendant.

*Wilmer, Cutler & Pickering (John D. Greenwald, Stuart M. Weiser)* for Defendant-Intervenor.

## MEMORANDUM OPINION AND ORDER

POGUE, *Judge:* This action is before the court on Plaintiffs' motion for a preliminary injunction. Defendant and Defendant-Intervenor oppose the motion for a preliminary injunction and Defendant has moved to dismiss Plaintiffs' complaint for lack of jurisdiction, USCIT R. 12(b)(1), and for failure to state a claim upon which relief can be granted, USCIT R. 12(b)(5).

## BACKGROUND

Plaintiffs commenced this suit to enjoin continuation of an antidumping duty investigation initiated by the United States Department of Commerce ("Commerce") in response to a petition filed by Cray Re-

search Inc.[1] Plaintiffs complain that Commerce has impermissibly prejudged the outcome of the pending antidumping investigation involving Japanese supercomputers, and that Commerce is incapable of investigating the pending dumping case in a fair and impartial manner.

JURISDICTION

Plaintiffs assert jurisdiction under 28 U.S.C. § 1581(i), "which *inter alia* grants this court residual jurisdiction over any civil action commenced against the United States or its agencies relating to the administration and enforcement of the antidumping law with respect to the matters referred to in 28 U.S.C. § 1581(c)." *Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 717 F.Supp. 847, 849 (1989).

Defendant and Defendant-Intervenor challenge Plaintiffs' assertion of jurisdiction under 28 U.S.C. § 1581(i) and argue that Plaintiffs instead have an adequate remedy under 28 U.S.C. § 1581(c) which should be exhausted prior to proceeding here. *See Miller & Co. v. United States*, 5 Fed.Cir. (T) 122, 124, 824 F.2d 961, 963 (1987).

The court has jurisdiction to hear the claim. A claim of administrative prejudgment is an action relating to the administration and enforcement of the antidumping law. Section 1581(c) does not provide an adequate remedy for such a claim. The reason is straightforward: If Plaintiffs were to pursue administrative remedies and proceed under 1581(c), they would be forced to participate in an investigation conducted by an allegedly biased decision maker who has allegedly prejudged the outcome of the case. This is a fool's errand, particularly when the judicial relief of disqualification can be granted at the outset of the investigation, rather than at the end, thus obviating the need to undo a complicated and time consuming administrative procedure, if Plaintiff should ultimately prevail. Accordingly, the court does not believe the exhaustion requirement is "appropriate"[2] for a claim of prejudgment.

STANDARD OF REVIEW

On a motion to dismiss for failure to state a claim, *see* USCIT R. 12(b)(5), the court, assuming "all well-pled factual allegations are true" and construing "all reasonable inferences in favor of the nonmovant," *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.Cir.1991), inquires whether the complaint sets forth facts sufficient to support a claim. To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint and documents incorporated in the complaint by reference. *See Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991).

The plaintiff is not required to set out in detail the facts upon which he or she bases a claim, but only that the defendant be given "fair notice of what his claim is and the grounds upon which it rests." *Conley v. Gibson*,

[1] The petition alleges that NEC, through HNSX and the Federal Computer Corporation (FCC), an integrator of high-performance computer systems, offered to sell four SX-4 supercomputers at less than fair value causing or threatening to cause material injury to Cray.

[2] *See* 28 U.S.C. § 2637(d).

355 U.S. 41, 47 (1957). Nor is it necessary for the particular relief requested to be available, as long as the court can ascertain that some relief is available. *Doe v. U.S. Dept. of Justice*, 753 F.2d 1092, 1103–1104 (D.C. Cir. 1985); *Lada v. Wilkie*, 250 F.2d 211, 215 (8th Cir. 1957). An unlikely or remote possibility of recovery is alone not a reason to dismiss. *Bernhelm v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). Dismissal is proper only "where it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief." *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988).

## Discussion

The law recognizes a claim for prejudgment, which, if proven, can result in disqualification of a biased decision maker. *See, e.g., Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965). "The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella*, 425 F.2d at 591 (D.C. Cir. 1970)(quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert denied*, 361 U.S. 896, 80 S.Ct. 200 (1959)). A public position on a policy issue is not disqualifying. *See Hortonville Joint School Dist. No. 1 v. Hortonville Educational Assn.*, 426 U.S. 482, 493 (1976). Similarly, prior knowledge of adjudicative facts is not disqualifying, *see Hortonville*, 426 U.S. at 493, but an advance commitment about those facts is. *See Cinderella*, 425 F.2d 583; *Texaco*, 336 F.2d 754.

To make out a prejudgment claim, Plaintiffs' proof must defeat the assumption that agency decision makers are "'[persons] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow v. Larkin*, 421 U.S. 35, 55 (1970), quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941).

In the posture of the instant motion, where the allegations of the complaint must be read as true, and all inferences construed in favor of the non-movant, the court concludes that Plaintiffs have alleged a claim for prejudgment. Specifically, Plaintiffs allege in paragraph 24 of their complaint that during meetings on the UCAR procurement, "Commerce representatives repeatedly stated that the NEC supercomputers were being offered to UCAR at less than fair value." That allegation, when taken with other allegations in the complaint, can be construed to suggest an advance commitment by Commerce Department decision makers that Plaintiffs were "dumping" the supercomputers. Therefore, Defendant's motion to dismiss must fail.

Defendant argues that even if Plaintiff has plead a cognizable claim of prejudgment, the case is nonetheless moot because each of the decision makers alleged to have prejudged Plaintiffs' case is no longer employed in the decision making position involved in this matter. Hence, the judi-

cial relief of disqualification of the alleged biased decision makers has already occurred, albeit, for reasons not connected to the case. To substantiate this claim of mootness, Defendant included declarations of the pertinent officials in support of its motion to dismiss. This material is outside the complaint, *see* USCIT R. 12(b). Accordingly, the court will consider defendant's supplemental allegations as a motion for summary judgment and will not act on that motion until Plaintiffs have had an opportunity to respond. *See* USCIT R. 7(d); *see also* USCIT R. 56.

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(Slip Op. 97–128)

THOM S. ZANI D/B/A WHOLESALE AND FRAME, LTD., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 95–07000907

[Defendant's motion for summary judgment granted]

(Dated September 15, 1997)

*Peter S. Herrick,* for plaintiff.

*Frank W. Hunger,* Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Susan Burnett Mansfield,* Senior Trial Counsel) and *Beth C. Brotman,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

OPINION AND ORDER

WATSON, *Senior Judge:* Defendant has moved for summary judgment dismissing this action as it relates to two entries on which liquidated duties had not been paid at the time the summons was filed, and affirming the classification of the remaining merchandise as "other made up articles," dutiable at 7% under HTSUS item 6307.90.99.

The imported merchandise consists of paintings that were denied duty-free entry under subheading 9701.10.00, HTSUS as "paintings * * * executed entirely by hand" because the Customs Service found that stencils were used in their production. A copy of the customs laboratory opinion on that point was attached to the government's motion as Exhibit A.

The motion is unopposed with respect to the entries on which duties were not paid and will accordingly be granted as to them without comment. With respect to the remaining merchandise plaintiff claims that there are material issues of fact in dispute.

Although plaintiff points out that the entry from which the samples were taken was not precisely identified, it does not deny that they were samples of the importation. Plaintiff does, however, argue that they were only 3 of 2,234 oil paintings, making a sample of 0.13 percent.

The adequacy of the sample does not become a material issue of fact, unless there is some evidence that the sample was unrepresentative. But nothing offered by plaintiff gives facts about the remainder of the importation. Indeed, the affidavit of the plaintiff offers no firsthand knowledge whatsoever regarding the nature of the remaining paintings. This lack of firsthand knowledge was confirmed in the deposition of plaintiff, attached as Exhibit E to the government's reply brief. An affidavit from Mr. Fred W. Scholle, identified as general manager of the supplier of the paintings, also fails to raise issues of material fact. It engages in a defense of the use of stencils in so-called "mixed media" paintings, it speaks of stencils as used to control over-spray from airbrushes, it confuses the issue by talking of mechanical reproduction as if that were the true alternative to painting entirely by hand, but it does not assert that the imported paintings were done without the aid of stencils.

Finally, Professor Jorge L. Vallina gives a written opinion that the imported paintings are not executed by mechanical means even though stencils may have been used in the painting process. While this is an interesting opinion on the question of whether these works can be considered artistic products, it does not raise any issues of fact with respect to the manner in which the importations were actually painted.

For the reasons given above there has been no issue raised as to the decisive fact that stencils were used in the production of these paintings. Classification as paintings executed entirely by hand was properly denied, and classification as other made up articles, dutiable at 7% was correct.

Summary judgement is granted to defendant dismissing the action for lack of jurisdiction with respect to the entries numbered G76–0002265–9 and ATO–0004378–9, and affirming the classification as other made up articles, dutiable at 7% under HTSUS item 6307.90.99.

(Slip Op. 97–129)

ADMIRAL CORP., AND ROCKWELL INTERNATIONAL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–07–00432

(Dated September 15, 1997)

## OPINION AND ORDER

WATSON, *Senior Judge:* Plaintiff brought this action in 1994 to challenge the 1986 assessment of antidumping duties on seven entries of television sets from Japan that had been imported in 1976. The administrative protest against the assessment of antidumping duties, the denial of which led to this action, was based on a claim that plaintiff Admiral should have been included in the 1980 settlement of antidumping duties that was reached between the Department of Commerce and 22 major importers of television sets from Japan. 45 Fed. Reg. 29623 (1980).

The government has moved to dismiss this action for lack of jurisdiction, specifically, that the selection of participants in the settlement agreement was a decision of the Department of Commerce, did not involve the U.S. Customs Service, and is therefore not within the Court's jurisdiction under 28 U.S.C. § 1581(a) because it was not protestable under 19 U.S.C. § 1514(a).

Plaintiff argues that the protest against the assessment of antidumping duties under 19 U.S.C. § 1514(a) was the only administrative remedy available to it in the circumstances. Plaintiff further argues that the jurisdictional issue is controlled by the decision in *Nichimen America, Inc. v. United States*, 938 F.2d 1286 (Fed. Cir. 1991) and ought to be resolved in its favor.

In the *Nichimen* decision the Court of Appeals pointed out that, even though after 1979 the proper vehicle for challenging matters underlying or ancillary to antidumping duties was through annual reviews under Section 751 of the Trade Agreements Act of 1979, 19 U.S.C. § 1675, "the question of whether Nichimen's entries for Montgomery Ward had been settled under the 1980 settlement agreement * * * is beyond the scope of a 751 review." 938 F.2d at 1292. Accordingly, the appellate court held that the matter was protestable under 19 U.S.C. § 1514(a)(3) covering "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury.

In short, *Nichimen* stands for the proposition that the failure of Customs to give an importer the benefit of a settlement agreement reached with the party on whose behalf it was making the importation could fairly be considered a matter related to the imposition of Customs duties. It was not just a facet of the administration of the antidumping duty law. In other words, it was within the power and authority of the Customs Service to treat Nichimen as an agent or alter ego of a party whose obligations for antidumping duties had been settled with the Department

of Commerce. The Court of Appeals also noted that the Departments of Treasury and Justice were signatories to the TV settlement agreement.

On the other hand, in this case we have a protest being used to try to reach a decision that is purely within the province of Commerce and cannot be characterized as involving the Customs Service other than as a later mechanical instrumentality. In these circumstances, unlike *Nichimen*, the Customs Service would have no discretion to give Admiral the benefits of a settlement agreement if Commerce had not included it therein, either in actuality or by necessary logical extension.

Without resolving the question, it is safe to say that Admiral had good alternatives to using the protest route to challenge its exclusion from the Settlement Agreement. Its exclusion became public knowledge on April 28, 1980 when the Secretary of Commerce entered into the Settlement Agreement. It is therefore possible to argue that under 28 U.S.C. § 2636(I) Admiral had two years from that date to bring an action challenging its exclusion. That action could come within the jurisdiction of the Court under 28 U.S.C. § 1581(i) as one arising from the administration of duty laws.

It is also possible to argue that such an action accrued when Admiral was later actually notified on September 15, 1985 that Commerce intended to instruct the Customs Service to begin liquidating its entries of television sets at a rate of duty applicable to those who were not covered by the Settlement Agreement.

That notification offered Admiral the possibility of requesting an administrative review within forty-five days of receipt of the notifying letter. Had that review been requested, it is conceivable that it might have been a vehicle for reaching the issue of its exclusion, either in the review or in the judicial review of that review provided in 28 U.S.C. § 1581(c). And, if by some chance, the choice of a 751 review and the subsequent judicial action turned out to be incapable of reaching the exclusion issue, it is likely that, as a reasonable step taken in an uncertain area, it would have tolled the two-year statute of limitations on an action under 28 U.S.C. § 1581(i) and still left that possibility open to plaintiff.

In the present state of affairs, however, plaintiff did not act on those possibilities and instead relied on a protest method that Congress clearly did not intend to make available for this sort of dispute. Thus, its choice of the protest route cannot be considered as tolling the statute of limitations on an action under 1581(i). See *Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d at 978.

For the reasons given above, defendant's motion to dismiss the action for lack of jurisdiction is GRANTED.

(Slip Op. 97–130)

KOIKE ARONSON, INC., PLAINTIFF *v.*
UNITED STATES OF AMERICA, DEFENDANT

Court No. 96–04–00960

[Motion to Dismiss for lack of jurisdiction granted.]

(Dated September 16, 1997)

*Soller, Shayne & Horn (Melvin E. Lazar)* for plaintiff.
*Frank W. Hunger,* Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (James A. Curley) for defendant.

OPINION AND ORDER

WATSON, *Senior Judge:* The government has moved to dismiss this action under U.S.C.I.T. Rule 12(b) for lack of subject matter jurisdiction. The thrust of the motion is that the protest made to the Customs Service against the classification of the importations pursuant to 19 U.S.C. § 1514 was deficient because it did nothing more than identify the classification to which objection was made. It did not identify any preferred alternative or give any details about the nature of the objection or the reasons for it. The government points out that the defective protest gave Customs no real opportunity to correct the alleged error, and should not be considered a valid protest. The government asserts that the denial of this protest could not serve as a jurisdictional prerequisite for the bringing of an action under 19 U.S.C. § 1581(a).

Plaintiff argues that the protest should have been viewed in conjunction with the previous communications on the subject between plaintiff and Customs or should be read in light of the points made in the later complaint in this civil action. In the view of the Court, both of these alternatives would go beyond even the most generous precedents and would completely eliminate any real standards of specificity in protests.

The cases cited by plaintiff do not provide any support for the validation of a protest that gives no clue whatsoever as to the nature of the classification being sought. In *Needlers British Imports v. United States*, 39 Cust. Ct. 321 (1957), Judge Mollison validated a protest that named the rate of duty desired but did not specify the number or language of the desired tariff provision. Although he stated that the protest might be "subject to criticism" for that reason, he nevertheless found that it was sufficient to direct the mind of Customs to the specific tariff provisions bearing the identified rates of duty.

In *Palmer Import Co., Inc. v. United States*, 55 Cust. Ct. 434 (1965) Judge Donlon validated a protest with the same sort of unelaborated reference to a rate of duty, on the ground that, under the circumstances, it was sufficient to advise the Collector of Customs of the claimed tariff provision. In the same vein, in *Norman G. Jensen, Inc. v. United States*, 55 Cust. Ct. 434 (1965). Judge Nichols held that a claim of 25 cents per

thousand feet of spruce lumber though "brief and cryptic" was sufficient to alert customs to the nature of the claim.

In *CR Industries v. United States*, 10 CIT 565 (1986), Judge Tsoucalas validated a protest in a somewhat more complex situation. The importation consisted of a sleeve-like device for the repair of worn shafts on motor vehicles. It was imported with a cup form that served as a tool to install the sleeve and also protected it during shipment. The government argued that failing to mention the cup in the protest precluded plaintiff's claim that it should be classified as an entirety with the sleeve. The Court held that the protest was sufficient to fairly apprize Customs that the cup was involved in the classification dispute as an entirety with the sleeve. Given the existence of a stated claim for the sleeve it was not guesswork to find that plaintiff was maintaining a previously communicated position that the sleeve and the cup were an entirety. It is safe to say however, that if plaintiff had tried to assert an independent claim for classification of the cup, the protest would have been held to be insufficient.

In all the aforementioned cases there was some information within the protest, either touching directly on the desired tariff treatment or linked to the fate of another claim that was reasonably calculated to direct the mind of Customs to the full nature of a specific claim. That cannot be said here.

In this situation there is no escaping the conclusion that the protest did not inform Customs of the nature of the objections to the classification and did not give Customs any identifiable alternative. For those reasons it was defective. *Davies v. Arthur*, 96 U.S. 148, 151 (1878).

For the reasons given above, the Court finds that it lacks subject matter jurisdiction over this action under 28 U.S.C. § 1581(a). Accordingly, defendant's motion to dismiss is GRANTED.

(Slip Op. 97–131)

CINSA, S.A. DE C.V., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND GENERAL HOUSEWARES CORP., DEFENDANT-INTERVENOR

Court No. 93–09–000538

[Plaintiff Cinsa, S.A. de C.V. ("Cinsa"), moved for judgment on the agency record challenging four findings underlying the final results of the fourth administrative review of the antidumping order *Porcelain-on-Steel Cooking Ware from Mexico; Final Results of Antidumping Duty Administrative Review*, 58 Fed. Reg. 43,327 (1993). Defendant, the U.S. Department of Commerce ("Commerce") and the defendant-intervenor, General Housewares Corp. ("GHC") opposed the motion for judgment on the agency record and requested the Court to sustain the final results in all respects. In Slip Op. 97–41, dated April 4, 1997, the Court affirmed three of the four issues challenged in the final results and remanded the finding on related party pricing to Commerce. In its final remand results, Commerce recalculated the final dumping margin based on Cinsa's claimed price of enamel frit and Cinsa requested the Court to affirm the final remand results. *Held:* The Court adopts its findings in Slip Op. 97–41 as well as Commerce's final remand results with respect to the determination to rely on the transfer price of enamel frit provided by Cinsa.]

(Decided September 16, 1997)

*Manatt, Phelps & Phillips (Irwin P. Altschuler, David R. Amerine and Ronald M. Wisla)* for plaintiff.

*Frank W. Hunger,* Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Velta Melnbrencis)* for defendant.

*King & Spalding (Joseph W. Dorn and Gregory C. Dorris)* for defendant-intervenor.

OPINION

MUSGRAVE, *Judge:* Plaintiff, Cinsa, S.A. de C.V. ("Cinsa"), brought this action to contest the final results of the fourth administrative review of the antidumping duty order *Porcelain-on-Steel Cooking Ware from Mexico; Final Results of Antidumping Duty Administrative Review*, 58 Fed. Reg. 43,327 (1993). In the final results, the U.S. Department of Commerce ("Commerce") determined that Cinsa would be assessed an 8.18% dumping margin. Pursuant to 19 U.S.C. § 1516a(a)(2)(A)(ii) (1994), Cinsa appealed the final results and requested that the Court reverse the final results and remand the action to Commerce to: (1) calculate the cost of production ("COP") and constructed value ("CV") using historical rather than revalued depreciation; (2) calculate COP and CV excluding employee profit sharing expense; (3) calculate CV using Cinsa's submitted purchase prices to value the enamel frit raw material costs; and (4) calculate COP and CV using all verified interest income. The Court remanded Commerce's calculation of CV to determine whether the transfer price of enamel frit constituted an arm's length transaction as prescribed by statute and previous practice. The Court affirmed the final results with respect to the calculation of COP and CV using revalued depreciation, calculation of COP and CV including employee profit sharing expense and calculation of COP and CV using only short-term interest income to offset total interest expense in its opinion dated April 4, 1997.

Although Commerce, in its final remand results filed July 2, 1997, "disagree[d] with the Court's conclusion that CINSA fulfilled its burden of proving the arm's length nature of the related party transfer price," Commerce nevertheless accepted the related party pricing that Cinsa had supplied in its questionnaire response and recalculated Cinsa's weighted-average dumping margin to be 6.04 percent *ad valorem*. The Court reiterates that the burden is on the respondent to establish that the related party transfer price was determined at arm's length. The Court found that it was unclear whether Cinsa fulfilled this burden but Cinsa did effectively shift the burden of proof to Commerce when it provided the information requested in the questionnaire. The Court finds that a party cannot be penalized for not providing information that was neither required nor requested.

Cinsa has subsequently filed a motion for the Court to affirm Commerce's final remand results and GHC did not file a response. The Court adopts its opinion dated April 4, 1997, Slip Op. 97–41, and Commerce's final remand results with respect to the determination to rely on the transfer price of enamel frit submitted by Cinsa.

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(Slip Op. 97–132)

CULTIVOS MIRAMONTE S.A. AND FLORES MOCARI S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANTS, AND FLORAL TRADE COUNCIL, DEFENDANT-INTERVENOR

Court No. 96–09–02222

[Final results of administrative review sustained in part and remanded in part]

(Decided September 17, 1997)

*Arnold & Porter (Michael T. Shor)* for Plaintiffs.

*Frank W. Hunger,* Assistant Attorney General of the United States, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Velta A. Melnbrencis,* Assistant Director; Of Counsel, *Lucius B. Lau,* Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, Counsel for Defendants.

*Stewart & Stewart (Terence P. Stewart, James R. Cannon, Jr., Amy S. Dwyer,* and *Mara M. Burr)* for Defendant-Intervenor.

OPINION

POGUE, *Judge:* Plaintiffs[1] ("Miramonte") challenge certain aspects of the United States Department of Commerce ("Commerce") final deter-

[1] Plaintiffs Cultivos Miramonte S.A. and Flores Mocari S.A. are two related Colombian companies that produce and export fresh-cut flowers to the United States. Without objection, Commerce "collapsed" the two companies and treated them as a single entity for antidumping purposes. *See Certain Fresh Cut Flowers from Columbia*, 60 Fed. Reg. 30,270, 30,271 (Dep't Commerce 1995)(prelim. results admin. rev.).

mination in the consolidated fifth, sixth, and seventh administrative reviews of the antidumping order covering entries of fresh cut flowers from Colombia between March 1, 1991 and February 28, 1994. *See Certain Fresh Cut Flowers from Colombia*, 61 Fed. Reg. 42,833 (Dep't Commerce Aug. 19, 1996)(final results admin. rev.). The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c)(1994) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (1994).

Miramonte's motion for judgment on the agency record[2] raises three issues: (1) whether Commerce's change of practice in its treatment of Miramonte's land preparation costs was in accordance with law; (2) whether Commerce's use of best information available ("BIA") to adjust Miramonte's seventh review cost data for inflation was in accordance with law, and if in accordance with law, whether Commerce's use of a twelve-month compound inflation adjustment factor was supported by substantial evidence; and (3) whether Commerce's substitution and use of a 7.0 percent U.S. interest rate in the calculation of U.S. credit expense for the seventh period for all flower types instead of the actual percent rate reported by Miramonte and verified by Commerce was supported by substantial evidence.

## BACKGROUND

Miramonte received de minimis margins in the two administrative reviews preceding the three consolidated reviews at issue here. *See* 56 Fed. Reg. 50,554, 50,558 (Oct. 7, 1991); 59 Fed. Reg. 15,159, 15,179 (Mar. 31, 1994). Under its regulations Commerce may revoke an antidumping order covering a particular respondent if that respondent has zero or de minimis (less than 0.50 percent) dumping margins for three consecutive reviews, see 19 C.F.R. § 353.25(a)(2)(i), and that respondent will not likely sell the merchandise at less than foreign market value in the future. See 19 C.F.R. § 353.25(a)(2)(ii).

Unable to conduct the fifth and sixth administrative reviews, Commerce consolidated them with the seventh. Commerce's preliminary determination resulted in antidumping margins for Miramonte of 0.27 percent, 0.10 percent, and 0.11 percent in the fifth, sixth, and seventh administrative reviews, respectively. *See Certain Fresh Cut Flowers From Colombia*, 60 Fed. Reg. 30,270, 30,274 (Dep't Commerce June 8, 1995)(prelim. results admin. rev.). Commerce also announced its intent to revoke the antidumping duty order for Miramonte. Id. at 30,270.

In the final results Commerce found antidumping margins of 0.36, 0.00, and 2.08 percent for Miramonte in the fifth, sixth, and seventh reviews, respectively. 61 Fed. Reg. at 42,867. Thus, Miramonte's seventh period margin of 2.08 percent precluded revocation of the antidumping duty order. *Id.* at 42,833.

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[2] *See* USCIT R. 56.2.

## STANDARD OF REVIEW

In reviewing the final results of an administrative review, the Court of International Trade must decide whether Commerce's determination is in accordance with law and whether Commerce's conclusions are supported by substantial evidence on the record. *See* Section 516a(b)(1)(B)(i) of the Tariff Act of 1930, 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

In determining whether Commerce's interpretation and application of the antidumping statute is in accordance with law, this court applies the two-step analysis articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781–82 (1984), as applied and refined by the Federal Circuit. The first task is "to determine whether Congress has 'directly spoken to the precise question at issue.'" Id. If the statute unambiguously deals with the subject matter in issue, the court, as well as the agency, must give effect to the intent of Congress. *Id. See, e.g., Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 402–403 (Fed. Cir. 1994); *Zenith Elec. Corp. v. United States*, 988 F.2d 1573, 1582 (Fed. Cir. 1993). "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782. Considerable weight is accorded Commerce's construction of the antidumping laws, whether that construction manifests itself in the application of the statute, *see, e.g., Daewoo Elec. Co. v. Int'l Union of Elec.*, 6 F.3d 1511, 1516 (Fed. Cir. 1993); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996), or in the promulgation of a regulation, *see, e.g., Smith Corona Group v. United States*, 1 Fed. Cir (T) 130, 138, 713 F.2d 1568, 1575 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1274 (1984).

When examining Commerce's factual determinations to decide whether they are supported by substantial evidence, the court must determine whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support [Commerce's] conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 216 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951)(quoted in *Matsushita Comm. Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 1026–27 (1966).

## DISCUSSION

The antidumping statute applicable to the consolidated reviews in issue provides that if the Department of Commerce (Commerce) through the International Trade Administration (ITA) determines that less than fair value (LTFV) sales exist and the International Trade Commission

(ITC) determines that material injury exists, then the ITA will issue an antidumping order directing the United States Customs Service to collect antidumping duties equal to the amount by which foreign market value[3] exceeds the United States price[4] for the merchandise. *See* 19 U.S.C. § 1673 (1988).

Commerce computed Miramonte's foreign market value using constructed value,[5] which is the sum of the costs of materials and of fabrication employed in producing such or similar merchandise, an amount for general expenses and profit, and the cost of packing the merchandise for shipment to the United States. *See* 19 U.S.C. § 1677b(e)(1) (1988).

1. Treatment of Miramonte's Land Adequation Costs

As part of fabrication costs, Commerce requested that Miramonte provide its indirect costs and expenses incurred in the cultivation and harvesting of its flowers. *See* ITA Section B-C Quest., Pub. Doc. 450 (4/13/94) at 66. For these costs Commerce's questionnaire instructed, "[r]egardless of whether your company capitalized expenditures or expensed them, the cost submission should be consistent with your normal production accounting system and based on your actual accounting records, if your system and records are in accordance with Generally Accepted Accounting Principles (GAAP)." Pub. Doc. 450 at 62. Miramonte reported, inter alia, depreciation expenses for its greenhouses and "land adequation." Land adequation was described by Miramonte as leveling terrain, digging ditches, and constructing drainage systems for its greenhouses. *See* Miramonte Public § D QR, Pub. Doc. 783 (7/8/94) at 41.

In its accounting records Miramonte allocated the costs of the greenhouses over a twenty-year period and the costs of land adequation over a five-year period. In its questionnaire response Miramonte allocated its greenhouse costs over the same twenty-year period reflected in its books; for land adequation Miramonte allocated the costs over a twenty-year period as well, arguing that "the leveling, ditching and drainage will provide a benefit over the useful life of the greenhouse." Pub. Doc. 783 (7/8/94) at 31. Miramonte also stated that its practice was "exactly the same" as its submission for the third and fourth administrative reviews, which ITA accepted (and verified in the fourth), *id.*, and that its accounting system was "primarily oriented for tax purposes." *Id.* at 21.

In the Final Results Commerce used the five year cost allocation in Miramonte's accounting records rather than the twenty-year allocation provided in Miramonte's questionnaire response. 61 Fed. Reg. 42,846. Commerce stated that its administrative practice "is to adhere to an individual firm's recording of costs in accordance with GAAP of its home country if we are satisfied that such principles reasonably reflect the costs of producing the subject merchandise." *Id.* Commerce further

[3] *See* 19 U.S.C. § 1677b (1988).

[4] *See* 19 U.S.C. § 1677a (1988).

[5] Foreign market value is computed by one of three methods: (1) home market sales; (2) third country sales; or (3) constructed value. *See* 19 U.S.C. § 1677b(a) (1988).

noted that, in contrast to the instructions contained in the questionnaire, Miramonte had departed from its normal accounting records by allocating its land adequation costs over a twenty-year period. *Id.*

Commerce rejected the twenty-year allocation because "[a]lthough Miramonte stated that it considered land adequation to have the same useful life as a greenhouse, it never explained why it treated land adequation expenses differently in its accounting records, nor did Miramonte justify why a five-year amortization did not reasonably reflect the costs of producing the merchandise." *Id.*; *see also* Commerce Public Analysis Memo, Pub. Doc. 1733 (6/28/96) at 2–3. Therefore, Commerce "increased Miramonte's depreciation expense to reflect the amount of land adequation costs recorded in its accounting records." *Id.* at 42,847.

On its change of practice in the treatment of Miramonte's land adequation costs, Commerce stated:

> * * * we first note that verification of the values used in a methodology does not indicate acceptance of the methodology itself. We agree * * * that the FTC has not raised this issue in the past. An error in methodology, unmentioned and undiscovered in previous reviews, does not constitute explicit acceptance of that methodology. Nor are we bound by past reviews when we do discover a significant error. *See Shikoku Chem. Corp. v. United States*, 795 F. Supp. 417 (CIT 1992). In examining this methodology in these instant reviews, we have found the error to be significant. Miramonte's reported land adequation costs are approximately one-fourth of the amount recorded in its accounting records. Therefore, for these final results, we have increased Miramonte's depreciation expense to reflect the same amount of land adequation costs recorded in its accounting records.

*Id.*

To explain: the yearly expense from a twenty-year allocation of land adequation costs is one-fourth the yearly expense from a five-year allocation of such costs, which means lower fabrication costs, a corresponding lower constructed value, and ultimately, a lower dumping margin.

As noted above, Commerce stated in the Final Determination that its "practice is to adhere to an individual firms's recording of costs in accordance with GAAP of its home country if [Commerce is] satisfied that such principles reasonably reflect the costs of producing the subject merchandise," 61 Fed. Reg. at 42,846. This practice has been upheld by this court. *See, e.g.*, *FAG U.K. Ltd. v. United States*, 945 F. Supp. 260, 271 (CIT 1996)("reliance on an individual firm's home country GAAP provides an objective standard by which to measure costs, and allows a respondent a predictable basis on which to compute costs."). Commerce may, however, as it has done from time to time in the investigation and administrative reviews of this case, reject the use of home country GAAP as the basis for calculating production costs if the accounting methods at issue unreasonably distort or misstate costs for purposes of an antidumping analysis. *See* 61 Fed. Reg. at 42, 847 (cmt. 15).

For the third and fourth administrative reviews Commerce accepted Miramonte's reported land adequation costs which were allocated over a twenty-year period. In those reviews FTC did not challenge Commerce's treatment of these costs. For the consolidated reviews at issue here, Commerce changed its position, no longer accepting Miramonte's reported land adequation costs, and instead using the figures from Miramonte's books and records.

Commerce has the flexibility to change its position providing that it explains the basis for its change[6] and providing that the explanation is in accordance with law and supported by substantial evidence.[7]

Unlike the changes in other cases considered by this court, the change at issue here does not involve a new methodology or practice. *See, e.g., Hussey Copper, Ltd. v. United States*, 18 CIT 454, 457–458, 852 F. Supp. 1116, 1120 (1994) ("[Respondent] had no reason to believe that its method did not provide the 'best estimates' of the * * * cost, since the same method had been accepted and verified by Commerce in the previous investigation and Commerce never indicated during the proceeding of this administrative review that [respondent's] method was unacceptable."); *Shikoku Chem. Corp. v United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421–22 (1992).[8] Here, the administrative practice of adhering to books and records kept in accord with home country GAAP, unless distortive, had not changed from one review to the next; all that changed, apparently, was Commerce's weighing of Miramonte's evidence on the question of distortion. Thus, the issue in this case does not involve a change in methodology which implicates issues of statutorily implied standards of procedural fairness. Here, administrative practice had not changed, and presumably, having known what that practice

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[6] "The underlying ground of that principle is that the reviewing court should be able to understand the basis of the agency's action and so may judge the consistency of that action with the agency's general mandate." *Chennault v. Department of Navy*, 796 F.2d 465, 467 (Fed. Cir. 1986). The rule also assures that an administrative agency will be "faithful and not indifferent to the rule of law," *Columbia Broadcasting System, Inc. v. FCC*, 147 U.S. App. D.C. 175, 183, 454 F.2d 1018, 1026 (1971), and "prohibit[s] the agency from adopting significantly inconsistent policies that result in the creation of 'conflicting lines of precedent governing the identical situation.'" *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994)(quoting *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989); *see also Hussey Copper, Ltd. v United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993)("'This rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure consistency in an agency's administration of the statute.'")(quoting *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 FSupp. 1075, 1088 (1988)). "This is not to say that an agency, once it has announced a precedent, must forever hew to it. Experience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances. However, the law demands a certain orderliness. If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable." *Davila-Bardales*, 27 F.3d at 5.

[7] The court's review of an agency's change of position or practice will typically center on whether the action was arbitrary. A change is arbitrary if the factual findings underlying the reason for change are not supported by substantial evidence. Apart from factual findings, agency arbitrariness may also manifest itself in the particular reasoning offered by the agency; principally, if the reasoning is inconsistent with the statutory mandate, or, to a lesser extent, if the reasoning (or lack thereof) violates general principles of administrative law, *see, e.g., Hussey Copper, Ltd. v United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) or offends standards of procedural fairness implied in the statute. *See, e.g., Hussey Copper, Ltd. v. United States*, 18 CIT 454, 457–458, 852 F. Supp. 1116, 1120 (1994); *Shikoku Chem. Corp. v. United States*, 16 CIT 382, 388, 795 F.Supp. 417, 421–422 (1992). In this context the court reviews an agency change of position or practice to insure it is "in accordance with law."

[8] In *Shikoku* Commerce adopted a slightly improved allocation methodology to calculate a packing adjustment to home market value in its fifth administrative review. 16 CIT at 384–86, 795 F. Supp. 417, 419–20. The methodology differed from the one used by the Department in the first through fourth reviews. For the second, third, and fourth reviews, respondent had zero or de minimis margins. *Id.* at 383, 795 F. Supp. at 418. Although the court found that there was a marginal increase in accuracy as a result of the new methodology, the court concluded, based on "principles of fairness" and "administrative equity," that "Commerce did not have adequate reasons for its last minute change in methodology," given the unchanged fact pattern from the prior reviews and the lack of discovery of a significant error. *Id.* at 388, 795 F. Supp. at 421–422.

was, Miramonte submitted evidence of distortion that it deemed sufficient to justify deviation from its books and records. Consequently, *Shikoku*, predicated as it is on concepts of procedural fairness and administrative equity, is not a guide for the resolution of the present case.

Notwithstanding its verification and acceptance of Miramonte's response in the fourth administrative review, Commerce stated that it had committed a significant error by using Miramonte's twenty-year cost allocation in prior reviews. Commerce need not perpetuate an error from one review to the next. *See Gilmore Steel, Corp. v United States*, 7 CIT 219, 224, 585 F. Supp. 670, 674 (1984) ("A contrary holding would be tantamount to saying that once an error initially evades detection, the ITA is thereafter powerless to take remedial steps, thereby compounding the error."). Acknowledgment of an error is therefore a proper legal basis for Commerce to change its position given an identical set of facts.

The difficulty here is that Commerce's specific findings are not supported by substantial evidence. Commerce stated in the final determination that Miramonte "never explained why it treated land adequation expenses differently in its accounting records, * * *." 61 Fed. Reg. at 42,847. Miramonte did, however, alert Commerce that its accounting records were "primarily oriented for tax purposes." Miramonte Public § D QR, Public Doc. 783 (7/8/94) at 21. This may or may not have been a sufficient explanation, *see, e.g., Hercules, Inc. v. United States*, 11 CIT 710, 755–56, 673 F. Supp. 454, 491 (1987)(holding that mere assertion that accounting records were tax-motivated and not reflective of true costs was insufficient), but it was some explanation. Commerce's conclusion that Miramonte "did not justify why a five year amortization did not reasonably reflect the cost of producing the merchandise," 61 Fed. Reg. at 42.847, is similarly at odds with the administrative record. Miramonte explained that the land preparation provided a useful benefit for the life of its greenhouses which lasted twenty years. It therefore allocated the land preparation costs over twenty years. Here again, this explanation may or may not have been sufficient, but it nonetheless was some justification for Miramonte's claim that the five-year amortization did not reasonably reflect the cost of producing the merchandise. The record does not support the finding that Miramonte never explained or justified its questionnaire response. Lacking the requisite substantial evidence, Commerce's explanation of its change of practice cannot be sustained. The matter must therefore be remanded for Commerce to articulate a reason for its change that is supported by substantial evidence on the record. *See Camp v. Pitts*, 411 U.S. 138, 143, 93 S. Ct. 1241 (1973)(stating that if the contemporaneous explanation of the agency is based on a finding that is not sustainable on the administrative record, the matter must be remanded for further consideration.).

If Commerce overlooked the question of distortion when it previously accepted Miramonte's twenty-year cost allocation for land preparation,

then Commerce must articulate this rationale; the Court cannot supply a rationale for this discretionary decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196–97, 67 S. Ct. 1575, 1577–78 (1947)("* * * a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").[9] While the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286, 95 S. Ct. 438, 441 (1974), "the agency must examine the relevant data and articulate a satisfactory explanation for its action * * *." *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mutual Auto. Ins. Comp.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866 (1983).

2. Best Information Available

A. Application of BIA to Adjust Miramonte's Costs for Inflation

Normally, Commerce requires respondents to report pre-production expenses consistent with their home country GAAP, which typically are reflected in respondents' ordinary books and records. *See* 61 Fed. Reg. at 42,847. In prior reviews Commerce accepted pre-production expenses that were amortized over a longer period than the period contained in respondents' books and records. Commerce terms this alternative approach to pre-production expenses the "Crop Adjustment Method." *See* 61 Fed. Reg. at 42,847 (cmt. 15); *see also Fresh Cut Roses from Colombia*, 60 Fed. Reg. 6980, 6997–98 (1995) (cmt. 19) (accepting pre-production costs that differed from accounting records).

In its Section D questionnaire response Miramonte acknowledged that its methodology for reporting cost data in the antidumping questionnaire differed from that used in its ordinary books and records. *See* Miramonte Public § D QR, Pub. Doc. 783 (7/8/94) at 30. As noted above, Miramonte explained that its accounting system was "primarily oriented for tax purposes" and, therefore, Miramonte had developed a different methodology to report costs for purposes of these reviews, including the third and fourth reviews. *Id.* at 21.

Miramonte did not amortize pre-production costs for pompons or chrysanthemums in its June 8, 1994 or August 22, 1994 questionnaire responses. Instead, it used offsets, shifting the costs according to the production cycle of these flower types. Miramonte explained that it took its propagation costs from the first month and reported them as expensed four months later when the flowers associated with such propagation expenses were harvested. Similarly, Miramonte took its production expenses from the first month and reported them as expensed three months later when the flowers were harvested. Commerce verified this method of reporting costs.

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[9] At oral argument, counsel for Defendant and counsel for Defendant-Intervenor suggested that a fair reading of the final determination suggests that Commerce's error from the prior review involved the Department's failure to examine closely the question of distortion, and that having corrected that error in the present consolidated reviews, Commerce lawfully concluded that Miramonte had failed to make a sufficient showing of distortion to justify deviating from the costs in its books and records. After careful review of the final determination, the Court is reluctant to join this interpretation and thereby supply a rationale for the decision not articulated by the agency.

In its preliminary determination, Commerce noted a change in Colombian GAAP effective January 1, 1992. *Id.* at 30,274. According to Colombian law, flower growers were required to revalue certain financial statement accounts to reflect the effects of inflation experienced during each financial reporting period. Commerce issued a supplemental questionnaire instructing certain respondents to report their pre-production costs adjusted for inflation:

> If you have reported amortized pre-production costs in Tables 2A, 2B, or 2C * * *, revise these expenses so that they are based on asset values which, in accordance with Colombian GAAP, have been adjusted to reflect the effects of inflation and submit new diskettes.

ITA Public Supp. Quest., Pub. Doc. 1508 (6/22/95) at 1.

Miramonte indicated that it was confused about how to report inflation adjustments for the pre-production costs reported in its questionnaire response. *Id.* at 4. Miramonte's accounting books did not contain inflation adjustments based on the three and four-month offset periods used in the questionnaire response. In its books, Miramonte used one-month offset periods. Rather than submit inflation adjustments for the offset costs reported in its original questionnaire response, Miramonte responded to Commerce's supplemental questionnaire by reporting the costs and inflation adjustments for propagation and production expenses contained in its books and records.

Commerce concluded that Miramonte erred because its reported inflation-adjusted costs were inconsistent with the previously reported costs which had been verified by Commerce. When compared with the verified cost data, certain line totals in the inflation adjusted data were actually less than line totals in verified reported costs. *See* Commerce Public Analysis Memo, Pub. Doc. 1733 (6/28/96) at 2. Having concluded Miramonte's submission was non-responsive, Commerce used the best information available (BIA) to increase Miramonte's expenses, except for depreciation, in all three review periods to account for inflation. *Id.*

Miramonte challenges Commerce's application of BIA, arguing that the resort to BIA was not in accordance with law. Section 776(c) of the Tariff Act of 1930, as amended 19 U.S.C. § 1677e(c)(1988) states that ITA "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." Under ITA's regulations, BIA is used whenever ITA "(1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted." 19 C.F.R. § 353.37(a).

Commerce must "fairly request" the data prior to resorting to any secondary information. *See Koyo Seiko Co. v. United States*, 92 F.3d 1162, 1165 (Fed. Cir. 1996). Once Commerce has done so, it possesses the "discretion to determine whether a respondent has complied with an information request." *Daido Corp. v. United States*, 893 F. Supp. 43, 49–50

(CIT 1995) (citing S. Rep. No. 249, 96th Cong., 1st Sess. at 98 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979).

Although the supplemental questionnaire did not address Miramonte's situation with unmistakable clarity, (Miramonte did not report "*amortized* pre-production costs" in its original questionnaire response), the supplemental questionnaire nonetheless fairly requested inflation adjustments, and Miramonte's response was inappropriate given the facts of these consolidated administrative reviews. The questionnaire did not request that Miramonte abandon its previously verified reported costs, or substitute completely different, unverified cost data.

It was clear from the original questionnaire that Commerce was seeking an accurate, verifiable statement of pre-production costs. It was clear from the supplemental questionnaire that Commerce sought an inflation adjustment to these costs. *See* ITA Public Supp. Quest., Pub Doc. 1508 (6/22/95) at 21 ("revise these expenses so that they are based on asset values which, in accordance with Colombian GAAP, have been adjusted to reflect the effects of inflation."). Miramonte's "offsets" approach, an adaptation of the "Crop Adjustment Method" for which no amortization of costs was made, was verified and accepted by Commerce. The clear intent of the supplemental questionnaire was to acquire inflation adjustments for these previously reported and verified costs. Although the questionnaire used the qualifier "amortized," presumably because most respondents had amortized costs in one form or another in their earlier responses, the fair import of the request was clear, and it applied with equal force to Miramonte's "offsets" situation.

By adapting the "Crop Adjustment Method" to its own uses, Miramonte accepted the responsibility to ask Commerce for clarification of any information requests that could involve that adaptation. In its original questionnaire response Miramonte departed from its ordinary books and records in reporting pre-production costs using a three-month rather than the one-month offset period. Such adjustments obligated Miramonte to clarify any confusion with the requirements of the supplemental questionnaire as they pertained to Miramonte. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 57 Fed. Reg. 28,360, 28,381 (Dep't Commerce 1992) (final results admin. rev.) ("If a respondent found the requirements to be unclear, then the burden is on the respondent to ask the Department for guidance."), *aff'd*, *Emerson Power Transmission Corp. v. United States*, 19 CIT ____, 903 F. Supp. 48, 55 (1995) (affirming ITA's resort to BIA when questionnaire instructions were clear on their face despite respondent's misinterpretation).

Having concluded that Commerce's supplemental questionnaire fairly requested inflation adjustments to reported pre-production costs, the remaining question is whether Miramonte properly responded to that request. Commerce explained in the Final Results that "in many countries that experience high inflation, GAAP requires that fixed assets be

indexed (i.e., increased) annually to reflect the increasing nominal value of those assets as stated in prevailing currency units." 61 Fed. Reg. at 42,845. In its case brief Miramonte acknowledged that this adjustment would lead to an upward adjustment to asset values. *See* Asocoflores Case Brief, Pub. Doc. 1695 (8/11/95) at 14 ("the value of assets must be adjusted to reflect the hypothetical increase in value due to inflation") (emphasis added). When Commerce asked respondents to "revise these expenses so that they are based on asset values which, in accordance with Colombian GAAP, have been adjusted to reflect the effects of inflation," ITA Public Supp. Quest., Pub. Doc. 1508 (6/22/95) at 21, both the agency and Miramonte recognized that the adjustment to be made would result in increases to reported expenses.

Miramonte also demonstrated this expectation of an increase in expenses when it submitted its July 18, 1995 response to Commerce's inflation adjustment questionnaire. In its response, Miramonte stated that "[t]his adjustment includes both the additional income by monetary correction (the additional value in the asset) and the additional charge in the cost of production." Miramonte Public Supp. QR, Pub. Doc. 1580 (7/18/95) at 4 (emphasis added).

Upon review of the underlying numbers accompanying Miramonte's July 18, 1995, response, Commerce recognized that the inflation adjustment to Miramonte's "'Crops in Process' account was distributed on a monthly basis to each flower type based on the same methodology it used to allocate the depreciation expense." ITA Public Analysis Memo, Pub. Doc. 1733 (6/28/96) at 2. Commerce "examined Miramonte's data and discovered that, while some line totals increased, others stayed the same. Moreover many line totals decreased." *Id.*

Confronted with cost data which had been previously verified, and written narrative from Miramonte which indicated that the adjustment would result in increases to Miramonte's line totals (a result that Commerce had expected based on Colombian GAAP), Commerce viewed the existence of unchanged data and data which decreased in value as an inconsistency, and concluded that Miramonte had not made the inflation adjustment as requested by Commerce. Commerce's finding that Miramonte failed to respond properly to its request for inflation adjustment data is supported by substantial evidence,[10] and, accordingly, Commerce's application of BIA to adjust Miramonte's verified cost data for inflation was in accordance with law.

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[10] Miramonte has attempted to demonstrate that there was no inconsistency in its cost data by referencing "its September 10, 1996 request for correction of clerical errors. * * *" Miramonte brief at 30. The final results in this case were signed by the Assistant Secretary for Import Administration on August 9, 1996, and published by Commerce on August 19, 1996. *See* Pub. Doc. 1843; 61 Fed. Reg. 42,833 (Aug. 19, 1996). As defined by the statute, the record for review includes "a copy of all information presented to or obtained by [Commerce] during the course of the administrative proceeding * * *." 19 U.S.C. § 1516a(b)(2)(A)(i) (emphasis added). This statutory language "has been interpreted by this Court to mean that, barring exceptional circumstances, 'the scope of the record for purposes of judicial review is based upon information which was 'before the relevant decision-maker' and was presented and considered 'at the time the decision was rendered.'" *Kerr-McGee Chem. Corp. v. United States*, Slip Op. 97–2 at 19 (CIT Jan. 8, 1997) (quoting *Beker Industries Corp. v. United States*, 7 CIT 313, 315 (1984)). No "exceptional circumstances" exist here; rather, Commerce based its decision to reject Miramonte's inflation adjustments upon inconsistencies contained in the administrative record. Miramonte's request for correction of clerical errors was submitted on September 10, 1996, which as after Commerce rendered its decision on Miramonte's response. *See* Pub. Doc. 1843. The September 10 response was outside the administrative record and Commerce properly did not consider it for purposes of the final results.

An additional factor supports Commerce's application of BIA in this situation. Section 776(b)(2) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677e(b)(2)) and 19 C.F.R. § 353.25(c) require ITA to verify all information relied upon in revoking an order. If the agency is unable to verify the accuracy of the information submitted, Commerce may resort to "best information available." Miramonte submitted its revised pre-production costs and accompanying inflation adjustments after the preliminary determination and after verification. *See* Miramonte Public Supp. QR (7/18/95), Pub. Doc. 1580 at 2–4. Acceptance of the revised costs at that date would have required Commerce to re-verify Miramonte's pre-production costs. Commerce was "unable to verify, within the time specified, the accuracy and completeness of the [new] factual information submitted," 19 C.F.R. § 353.37(a)(2), and therefore, use of best information available was appropriate.

If data are accepted after verification, there is not only no guarantee of accuracy, but opposing parties are denied the opportunity to have their claims tested through the verification process. Thus, Miramonte's submission of revised pre-production costs was untimely and resort to "best information available" was in accordance with law.

B. Selection of Inflation Adjustment Factor

Resort to best information available may be either "total" or "partial." *See National Steel Corp. v. United States*, 870 F. Supp. 1130, 1135 (CIT 1994). Because Commerce determined that only part of Miramonte's data was deficient (i.e., the inflation adjustment), it applied partial BIA for Miramonte.

As partial best information available, ITA increased Miramonte's expenses, except for depreciation, in all three review periods using the Colombian PAAG inflation rates.[11] *See* ITA Public Analysis Memo, Pub. Doc. 1733 (6/28/96) at 2. Thus, for the seventh review period, Commerce used an inflation adjustment factor of 21.24 percent which reflected the cumulative inflation rate for the twelve-month period of September 1992 through August 1993. *See* ITA Public Analysis Memo at Attachment, Pub. Doc. 1733 (6/28/96).

For all respondents, including Miramonte, that failed to adjust their pre-production expenses for the effects of inflation, Commerce adjusted those expenses for the sixth and seventh reviews using twelve months of Colombian inflation rates ending in mid-year because "respondents generally amortized pre-production costs over eighteen months." Commerce Public Cost Memo, Pub. Doc. 1721 (2/20/96) at 2. Attached to the public cost memorandum was a chart which listed the monthly Colombian inflation index and which calculated cumulative inflation indices for the fifth, sixth, and seventh periods of review.

Although Miramonte produced standard carnations for export during the fifth review period and submitted constructed value information for

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[11] Each month the Government of Colombia publishes an inflation index, known as the percent annual inflation rate ("PAAG") index. Pub. Doc. 1695 at 14.

this flower type, *id.* at 28; Miramonte Public Supp. QR at 4, Pub. Doc. 945 (8/22/94); Miramonte Verification Report at 1, Pub. Doc. 1270 (10/24/94), Miramonte primarily produced pompons and chrysanthemums for the periods of investigation. The production cycle for pompons and chrysanthemums is shorter than the production cycle for carnations. Miramonte, therefore challenges Commerce's application of an inflation adjustment factor in the seventh review based on the production cycle of carnations.

The statute requires Commerce to resort to "best information available" under certain circumstances, but does not specify what information should be selected as "best information available." 19 U.S.C. § 1677e(c) (1988). Through counsel, Commerce concedes that the selection of an inflation adjustment factor based on the production cycle of carnations was an inadvertent error and requests a remand to permit re-calculation of Miramonte's inflation adjustment factor based on the production cycles of chrysanthemums and pompons. FTC argues that the selection of an inflation-adjustment factor based on the production cycles of carnations was appropriate given that Miramonte had reported some cost information for carnations in the fifth review. FTC also argues that such an inflation adjustment factor is appropriately adverse to Miramonte's interests given their noncompliance with Commerce's request.

The Court agrees that it was error for Commerce to consider only a carnation-based inflation adjustment factor to calculate Miramonte's inflation-adjusted costs. Commerce requests remand to calculate a new inflation adjustment factor for Miramonte. The issue will be remanded for Commerce to do this, but Commerce must also explain the appropriateness of the amount it selects given FTC's arguments.

### 3. Amount of Interest Rate in Calculation of U.S. Credit Expense

Miramonte challenges Commerce's application of a 7.0 percent U.S. interest rate in the calculation of U.S. credit expense for the seventh period for all flower types instead of the actual percentage rate reported by Miramonte and verified by Commerce. Commerce has requested a remand to permit recalculation of Miramonte's U.S. credit expense using the actual percentage rate. FTC does not object to a remand. Accordingly, the matter will be remanded for Commerce to make the appropriate correction.

## Conclusion

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision, it is hereby

Ordered that the Department of Commerce's final determination in *Certain Fresh Cut Flowers from Colombia*, 61 Fed. Reg. 42,833 (Dep't Commerce Aug. 19, 1996)(final results admin. rev.) is sustained in part and remanded in part; and it is further

ORDERED that the issue of Commerce's treatment of Miramonte's land adequation costs is remanded for further consideration in accord with the Court's opinion; and it is further

ORDERED that Commerce's decision to use best information available to adjust Miramonte's pre-production costs for inflation is sustained; and it is further.

ORDERED that the case is remanded to Commerce to (1) select an inflation adjustment for plaintiffs' sales of chrysanthemums and pompons based upon the production cycle for chrysanthemums and pompons using information contained in the administrative record, and (2) correct the selection of the interest rate for imputed credit calculations; and it is further

ORDERED that the remand results are due on **Tuesday, November 18, 1997**; comments and responses are due on **Wednesday, December 17, 1997**; any rebuttal comments are due on **Tuesday, January 6, 1998**; and it is further

ORDERED that plaintiffs' motion is denied in all other respects and the final results of the administrative reviews are sustained in all other respects.

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(Slip Op. 97–133)

UNITED STATES, PLAINTIFF *v.*
SENTRY INSURANCE, A MUTUAL CO., DEFENDANT

Court No. 94–03–00173

Plaintiff moves for summary judgment, claiming Sentry Insurance, A Mutual Company ("Sentry"), owes the U.S. Customs Service duties for foreign repairs made on an American vessel totaling $24,818.21 plus interest, costs, expenses and attorneys' fees. Sentry cross-moves for summary judgment.

*Held:* Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. Case dismissed.

[Plaintiff's motion for summary judgment is denied; defendant's motion for summary judgment is granted; case dismissed.]

(Dated September 17, 1997)

*Frank W. Hunger*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(James A. Curley);* of counsel: *Jeffrey Sajdak*, Office of the Assistant Chief Counsel, United States Customs Service, for plaintiff.

*O'Donnell, Byrne & Williams (Michael A. Johnson);* of counsel: *Paul V. Byrne*, for defendant.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff moves for summary judgment, claiming Sentry Insurance, A Mutual Company ("Sentry"), is liable to

the U.S. Customs Service ("Customs") for unpaid amounts pursuant to a Vessel, Vehicle, or Aircraft Bond (Single Entry) *("Bond")* related to foreign repairs made on an American vessel that Trinidad Corporation ("Trinidad"), as principal, and Sentry, as surety, executed and delivered to Customs. Customs contends it is due a total of $24,818.21 in duties plus interest, costs, expenses and attorneys' fees from Sentry under the Bond. Sentry cross-moves for summary judgment.

## BACKGROUND

Under 19 U.S.C. § 1466 (1988), a U.S.-registered vessel engaged in trade is liable for duty in the amount of 50 percent ad valorem of the cost of repairs made in a foreign country on that vessel upon the vessel's first arrival in any port of the United States. In anticipation of such duties, on January 30, 1985, agents of both Trinidad and Sentry executed and delivered to Customs the Bond related to the entry of the *Admiralty Bay* to a U.S. port. Under the terms of the Bond, Trinidad and Sentry are jointly and severally liable for any duties, charges, exactions, penalties or other sums found legally due the United States. See Bond, Def.'s App., Ex. A (Jan. 30, 1985).

On February 1, 1995, Trinidad entered the *Admiralty Bay*, a U.S.-registered vessel engaged in trade that had been subject to foreign repairs effectuated in Japan, at the port of Valdez, Alaska. Soon after the entry of the vessel, Trinidad filed its initial application for determination of duties, estimating it owed $976,080.00 in duties for vessel repairs, with the Liquidation Branch of the U.S. Customs Service in San Francisco, California. *See Letter from B.A. McKenzie & Co., Inc. to U.S. Customs Service*, Def.'s App., Ex. C (June 24, 1985). Customs, however, did not demand deposit of estimated duties from Trinidad or inform Trinidad or Sentry of any liquidation at that time.

On December 24, 1987, Apex Oil Company and fifty-one of its subsidiaries, including Trinidad, filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Eastern District of Missouri. On April 1, 1988, two years and nine months after Trinidad's initial application for determination of duties, Customs purported to liquidate the vessel repair entry at $997,053.50. Thereafter, on June 7, 1988, pursuant to 19 C.F.R. § 113.38(c)(4) (1988), Customs notified Sentry that: (1) liquidation of the entry had occurred; (2) $1,005,258.53, which comprised the original duty amount in addition to the accumulated interest at the time, was owed by Trinidad; (3) Trinidad was in bankruptcy; and (4) Sentry should direct any payment or further correspondence to the Director of the U.S. Customs National Finance Center in Indianapolis, Indiana, within 120 days. *See Letter from U.S. Customs Service to Sentry Ins. Co.*, Def.'s App., Ex. E.

On July 16, 1988, Customs filed a claim against Trinidad in the bankruptcy proceedings (Claim No. 235), including a claim for $997,053.50 and "0 interest" relating to the alleged liquidated duty amount of the entry. *Opinion & Order, In re Apex Oil Co.*, Def.'s App., Ex. D, at 3 (Bankr. E.D. Mo. March 26, 1992). On August 2, 1988, Mathiasen's

Tanker Industries, Inc. ("MTI"), debtor-in-possession, prepared and mailed a check for $997,053.50 in payment of the portion of Claim No. 235 relating to the foreign vessel repair entry. Customs negotiated MTI's check on August 8, 1988. Customs claimed that, after negotiation of the check from MTI, a balance of $24,818.21 remained in duties from the accumulated interest on the original duty amount since, pursuant to 19 C.F.R. § 24.3a(c)(4) (1988), a late payment is first applied to the interest charge on the delinquent amount, and then to the delinquent principal amount.

On September 1, 1988, pursuant to MTI's payment, Customs filed a Notice of Satisfaction of Claim with the Bankruptcy Court, stating that its claim against Trinidad had been fully satisfied by MTI. *See Notice of Satisfaction of Claim*, Pl.'s App., Ex. 7. Subsequently, within the time specified by Customs for protest, Sentry responded to the National Finance Center, objecting to the payment of interest and pointing out that the entry was liquidated after the commencement of bankruptcy proceedings by the principal on the bond and, therefore, Customs should either waive the interest or collect it through the bankruptcy court, where the government's rights are superior to those of any private party. *See Letter from Attorneys for Sentry Ins. Co. to U.S. Customs Service, National Finance Center*, Def.'s App., Ex. F. (Sept. 2, 1988).

Trinidad, on August 11, 1989, filed an Objection to Claim No. 235, seeking disallowance of the claim on the basis that the claim was paid in full and payment had been acknowledged. The Bankruptcy Court responded by entering a Default Order Sustaining Objection to Claim No. 235 on September 29, 1989, and concluding that Customs violated the automatic stay effected under 11 U.S.C. § 362(a)(1) (1988) once an entity files under Chapter 11. *See In re Apex Oil Co.*, 122 B.R. 559, 567 (Bankr. E.D. Mo. 1990). The Bankruptcy Court, however, decided to refer the matter to the U.S. Court of International Trade. *See id.* at 566. On appeal, the U.S. District Court for the Eastern District of Missouri affirmed the Bankruptcy Court's holding but determined that the matter should not be referred to the U.S. Court of International Trade because it was in the interest of justice to keep the matter in bankruptcy court. *See In re Apex Oil Co.*, 131 B.R. 712, 715–16 (E.D. Mo. 1991). Finally, the Bankruptcy Court entered its decision confirming the satisfaction and disallowance of the claim at issue against Trinidad, deeming the claim fully satisfied by MTI's payment. *See Opinion & Order, In re Apex Oil*, Def.'s App., Ex. D.

Although the Bankruptcy Court held the debt satisfied as to Trinidad, Customs has continued to demand from Sentry the balance allegedly due from the *Admiral Bay*'s vessel repair entry under the Bond. The amount claimed by Customs had reached $40,228.69 as of May 28, 1993. *See Letter from U.S. Customs Service to Sentry Ins. Co.*, Pl.'s App., Ex. 6. On March 21, 1994, Customs filed suit with this Court against Sentry.

DISCUSSION

On a motion for summary judgment, it is the function of the Court to determine whether there remain any genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once the Court determines that no genuine issues of material fact exist, summary judgment is properly granted when the movant is entitled to summary judgment as a matter of law. *See Mignus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1582(2) (1988), which gives this Court exclusive jurisdiction over any civil action commenced by the United States for the recovery on a bond relating to the importation of merchandise. While the statute states that it pertains to the importation of *merchandise*, the legislative history clarifies that the section grants this Court jurisdiction over *all* suits by the Government for recovery on a Customs bond, unless such claims involve a bankruptcy. *See* H.R. Rep. No. 96–1235, 96th Cong., 2d Sess., at 7 (1980) ("This section authorizes the court to hear civil * * * actions seeking recovery on a customs bond or of customs duties.").

According to 19 U.S.C. § 580 (1988), in suits on bonds for recovery of duties, interest is allowed at a rate of six percent per year from the time the bond comes due. In this case, the Bond never came due because MTI's payment fully satisfied Trinidad's debt and discharged Sentry's obligation. Moreover, interest did not accrue on Trinidad's debt because Customs did not liquidate the entry at issue for over three years after entry of the *Admiralty Bay*, well after Trinidad filed for bankruptcy.[1]

The Bond in this case provides that Sentry's obligations terminate in the following manner:

> If [Trinidad] shall pay to the district director of customs of said port promptly on demand * * * any duties, charges, exactions, penalties, or other sums found legally due the United States from any master or other proper officer or owner of said vessel, vehicle, or aircraft on account of said vessel, vehicle, or aircraft;
>
> * * * * * * *
>
> Then this obligation [of Sentry] shall be void; otherwise to remain in full force and effect.

*Bond*, Def.'s App., Ex. A, at 1–2. Moreover, it is an elementary proposition of suretyship that where a principal is released by the creditor, the surety, whose obligation is accessory to the main obligation, is also discharged. **James L. Elder**, **The Law of Suretyship** (5th ed. 1972); *see also In re Teerlink Ranch Ltd.*, 886 F.2d 1233, 1235 (9th Cir. 1989) ("It is hornbook law that the debtor's payment of a debt discharges both the debtor and the guarantor of the debt. Where the debt is paid, the guarantee is extinguished. There is nothing more to guarantee.").

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[1] While 19 C.F.R. § 159.11 (1988) provides that an entry not liquidated within one year from the date of entry is deemed liquidated at the rate of duty, value, quantity and amount of duties asserted by the importer at the time of filing an entry, this provision explicitly excludes vessel repair entries.

As the Bankruptcy Court held and the District Court affirmed, Customs' April 1, 1988 liquidation was void as a violation of the automatic stay, and so, interest never began to accrue on the entry. Nevertheless, MTI paid the sum Customs demanded as duty on the entry and Customs subsequently filed a Notice of Satisfaction of Claim with the court, stating that "[t]he claim of the United States Customs Service * * * has been satisfied * * * from [MTI], in the amount of $997,053.50." Pl.'s App., Ex. 7. Consequently, according to surety law and the terms of the Bond, Sentry's obligation was discharged with Customs' satisfaction in bankruptcy court pursuant to MTI's payment of the amount due from Trinidad. In the words of the Bankruptcy Court in disallowance of Customs' claim, "Claim No. 235 filed by [Customs] against Trinidad Corporation *is deemed satisfied and paid in full and no additional principal or interest is due from [Apex, Trinidad, MTI]*, or any former debtor-in-possession or Reorganized Debtor, with respect to the vessel repair entry on the Admiralty Bay * * *." *Opinion & Order, In re Apex Oil*, Def.'s App., Ex. D, at 5 (emphasis added).

While 11 U.S.C. § 524(e) (1988) provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt," Sentry has no such liability in this case. The entry at issue had not been liquidated when MTI paid the entire amount Customs claimed as duty, a payment Customs acknowledged fully satisfied the duty owed under the entry, and interest had never accrued. Thus, because the principal paid all sums legally due the United States, the surety's obligation under the Bond terminated.

## CONCLUSION

Customs has not demonstrated that it was due any unpaid duty amount from Sentry. Consequently, in accordance with the foregoing opinion, this case is dismissed.

(Slip Op. 97–134)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 94–12–00779

(Dated September 18, 1997)

ORDER

TSOUCALAS, *Judge:* In accordance with the decision (July 22, 1997) and mandate (Sept. 12, 1997) of the United States Court of Appeals for the Federal Circuit, Appeal No. 97–1031, remanding this case with instructions, it is hereby

ORDERED that the portion of the decision of the Court in *Koyo Seiko Co. v. United States*, 20 CIT ____, 936 F. Supp. 1040 (1996), upholding the Department of Commerce, International Trade Administration's ("Commerce") application of best information available to the sample sales of Koyo Seiko Co. Ltd. and Koyo Corporation of U.S.A. ("Koyo") is vacated; and it is further

ORDERED that Commerce, in a manner consistent with *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), revise its margin calculations for Koyo to exclude sample sales if they were transferred without consideration; and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of this order.

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(Slip Op. 97–135)

CITRUS WORLD, INC., PLAINTIFF *v.*
UNITED STATES OF AMERICA, DEFENDANT

Court No. 94–03–00156

[Plaintiff's motion for reinstatement denied.]

(Dated September 18, 1997)

*Kay, Panzl & Latham, LLP (Peter G. Latham* and *Michael J. Beaudine)* for the plaintiff.
*Frank W. Hunger,* Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Saul Davis)* for the defendant.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* The plaintiff commenced the above-encaptioned action by filing a summons and then a complaint in March 1994, praying,

among other things, for drawback upon specified entries of citrus juice. The defendant interposed an answer soon thereafter.

In the absence of any discernible subsequent activity, on June 25, 1997 the court obtained a commitment from opposing counsel to prepare and file on or before July 18th a proposed order for final disposition of this action. They failed to keep it, whereupon the court was constrained to enter an order of dismissal on August 21, 1997 for lack of any indication of desire to prosecute.

Comes now the plaintiff with an Agreed Motion for Rehearing and for Reinstatement of This Case Before the Court, reporting on contacts between counsel since June 25, 1997, including a telephone conference with defendant's attorney on September 2nd,

> at which time Mr. Davis expressed his full support for the relief requested in this Motion. Mr. Davis has reviewed this Motion prior to its filing and consents to a rehearing consistent herewith, so that the merits of this case can be heard. Mr. Davis also consents to the revised proposed Scheduling Order * * *.

Plaintiff's Motion, para. 6. The court cannot do the same, even if it accepts plaintiff's representations, which tend to show fault on the part of the defendant.

As this court has opined, a party plaintiff has a

> primary and independent obligation to prosecute any action brought by it—from the moment of commencement to the moment of final resolution. That primary responsibility never shifts to anyone else and entails the timely taking of all steps necessary for its fulfillment.

*Avanti Products, Inc. v. United States,* 16 CIT 453, 453–54 (1992). *See also Fada Industries, Inc. v. United States*, 14 CIT 645, 647 (1990) (communications with opposing counsel (and the court) are "informative" but not necessarily protective of continuing viability of an action). Moreover, members of the Bar have been instructed that, when "formal, interlocutory relief becomes necessary, motions therefor must be presented in such a way as to convince the court that grant is appropriate." *Id.*, citing *Proceedings of the Second Annual Judicial Conference of the U.S. Court of Int'l Trade,* 111 F.R.D. 503, 586 (1985) (Aquilino, J.).

Here, the plaintiff has not done so. This action has been dismissed for lack of prosecution. While plaintiff's motion now reports adequately on events since June 25, 1997, it is devoid of a showing, any showing, of steps taken during the preceeding three years to prepare this action for resolution. Indeed, the implication of the accompanying proposed order, Exhibit C, projecting pretrial preparations, including discovery, well into next year is that nothing of significance has yet transpired. Be this as it may, the motion simply does not satisfy either of its stated predicates, CIT Rule 59(a) and Rule 60(b). The latter, which is more apposite, provides that the court

> may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mis-

take, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing under Rule 59(b); (3) fraud * * *, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged * * *; or (6) any other reason justifying relief from the operation of the judgment.

None of these grounds having been shown to exist[1], plaintiff's motion for reinstatement of this action must be, and it hereby is, denied.

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(Slip Op. 97–136)

TORRINGTON CO., PLAINTIFF AND DEFENDANT-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF SVERIGE AB, DEFENDANT-INTERVENORS AND PLAINTIFFS

Consolidated Court No. 95–03–00345

The Torrington Company ("Torrington") challenges the Department of Commerce, International Trade Administration's ("Commerce") explanation of its application of the reimbursement regulation in exporter's sales price situations contained in Commerce's *Final Results of Redetermination Pursuant to Court Remand, The Torrington Company v. United States, Slip Op. 97–29 (March 7, 1997) ("Remand Results")* (June 5, 1997). Torrington moves for an order directing Commerce to issue a second redetermination and either apply the reimbursement regulation on the basis of evidence already submitted or collect the necessary additional evidence. Torrington further claims Commerce committed two clerical errors in the Remand Results. SKF USA Inc. and SKF Sverige AB ("SKF") also challenge the Remand Results, claiming that, in implementing the results of the company-specific arm's-length test, Commerce included certain clerical errors in the program, preventing the results of that test from being completely incorporated in the margin program.

*Held:* This case is remanded to Commerce to correct the clerical errors identified in the computer program by Torrington and SKF in accordance with the Court's instructions. Following compliance with the Court's instructions, the Remand Results are affirmed.

[Torrington's motion for a second remand is granted in part and denied in part. SKF's motion for a second remand is granted. Case remanded and dismissed.]

(Dated September 19, 1997)

*Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, William A. Fennell, Geert De Prest* and *Lane Hurewitz)* for The Torrington Company.

*Howrey & Simon (Herbert C. Shelley, Alice A. Kipel* and *Anne Talbot)* for SKF USA Inc. and SKF Sverige AB.

*Frank W. Hunger,* Assistant Attorney General; *David M. Cohen,* Director Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Lucius B. Lau);* of counsel: *Mark A. Barnett,* Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

OPINION

TSOUCALAS, *Senior Judge:* On March 7, 1997, this Court, in *Torrington Co. v. United States*, 21 CIT ___, 960 F. Supp. 339 (1997), remanded

[1] *Cf. Wang Laboratories, Inc. v. United States*, 16 CIT 468, 471–72, 793 F.Supp. 1086, 1089–90 (1992).

to the Department of Commerce, International Trade Administration ("Commerce"), several issues arising from the final results of the administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al. ("Final Results"),* 60 Fed. Reg. 10,900 (1995), as amended, 60 Fed. Reg. 16,608 (1995).

On May 6, 1997, Commerce released the draft remand results and invited interested parties to comment. After receiving comments, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand, The Torrington Company v. United States, Slip Op. 97–29 (March 7, 1997) ("Remand Results")* (June 5, 1997).

The Torrington Company ("Torrington") challenges Commerce's explanation of its application of the reimbursement regulation in exporter's sales price ("ESP") situations contained in the Remand Results and moves for an order directing Commerce to issue a second redetermination and either apply the reimbursement regulation on the basis of evidence already submitted or collect the necessary additional evidence. Torrington further claims Commerce committed two clerical errors in the Remand Results. SKF USA Inc. and SKF Sverige AB ("SKF") also challenge the Remand Results, claiming that, in implementing the results of the company-specific arm's-length test, Commerce included certain clerical errors in the computer program, preventing the results of that test from being completely incorporated in the margin program.

1. *Reimbursement Regulation:*

In *Torrington*, 21 CIT at ____, 960 F. Supp. at 342, this Court remanded to Commerce to explain the circumstances in which it will apply the reimbursement regulation in an ESP situation. On remand, Commerce explained that it will apply the reimbursement regulation "if record evidence demonstrates that the exporter directly pays antidumping duties for the importer or reimburses the importer for such duties in ESP situations." *Remand Results* at 9. Torrington insists that Commerce has changed its position and, therefore, should be required to reopen the administrative record and investigate the possibility of reimbursement. *The Torrington Company's Comments on Commerce's Redetermination Pursuant to Court Remand* at 1–5.

This Court recently upheld Commerce's explanation and refused to reopen the administrative record, stating, "Commerce has not changed its approach to the reimbursement regulation in a manner requiring a reopening of the administrative record." *See FAG Italia S.p.A. v. United States*, 21 CIT ____, Slip Op. 97–107, at 4 (July 29, 1997) (citing *Torrington Co. v. United States*, 21 CIT ____, Slip Op. 97–106, at 5 (July 28, 1997)). As the issue in this case is identical to that in *FAG* and *Torrington*, the Court refuses to reconsider its position and sustains Commerce's Remand Results explanation of the circumstances in which it will apply the reimbursement regulation in an ESP situation.

2. *Clerical Errors:*

SKF argues that, in implementing the results of the company-specific arm's-length test, Commerce included certain clerical errors in the program, preventing the results of that test from being completely incorporated in the margin program. *Comments of SKF Regarding Redetermination Pursuant to Court Remand* at 1–7. Commerce consents to a remand for the correction of these errors, with one exception. *Defendant's Rebuttal Comments to SKF's and Torrington's Comments Regarding the Final Results of Redetermination Pursuant to Court Remand* at 2–3. According to Commerce, page 6 of SKF's proposed modifications contains a typographical error on line 340 of the margin calculation program. *Id.* In its rebuttal, SKF agrees its proposed modifications contain the typographical error noted by Commerce. *SKF's Rebuttal Comments Regarding Commerce's Redetermination Pursuant to Court Remand ("SKF's Rebuttal")* at 7 n.6.

Upon inspection of the record, the Court agrees that Commerce's computer program used in the Remand Results contained clerical errors and should be corrected in the manner proposed by SKF, with the exception of the typographical error noted by Commerce. Consequently, this issue is remanded to Commerce to correct the clerical errors pointed out by SKF, with the exception of the typographical error noted by Commerce.

In *The Torrington Company's Rebuttal Comments Re Commerce's Redetermination Pursuant to Court Remand* at 2–3, Torrington argues that it has identified two additional clerical errors in the computer program's application of the arm's-length test that it did not raise in its original comments and asks the Court to exercise its discretion by instructing Commerce to correct these additional errors. In particular, Torrington contends the computer program incorrectly indicates that the arm's-length test was negative only for cylindrical roller bearings, rather than for both ball bearings and cylindrical roller bearings, for two customer codes. *Id.* at 3.

SKF claims that Torrington's comments regarding these additional clerical errors are superfluous, as they are already coded in the manner suggested by Torrington in SKF's computer file submitted to Commerce. *SKF's Rebuttal* at 7 n.6.

Under 81(l) of the Rules of this Court, "[a] reply brief shall be confined to rebutting matters contained in the brief of the respondent[s]," in this case, SKF and Commerce. Nevertheless, the Court may exercise its discretion to prevent knowingly affirming a determination with errors. *See Toyota Motor Sales, U.S.A., Inc. v. United States*, 20 CIT ___, ___, 930 F. Supp. 636, 639 (1996) (citing *Serampore Indus. Pvt. Ltd. v. United States Dep't of Commerce*, 12 CIT 825, 834, 696 F. Supp. 665, 673 (1988) (exercising the Court's discretion to remand to determine whether a computer error had occurred because the action was already being remanded and because "[t]he Court is loathe to affirm a determination that might be based on a questionable record")).

Upon careful review of the record, the Court agrees with Torrington that two additional clerical errors exist with respect to the computer program's application of the arm's-length test that are not superfluous. While the computer program codes these customer codes as related parties, it indicates that the arm's-length test was negative only for cylindrical roller bearings, and not for ball bearings. Consequently, this issue is remanded for Commerce to correct the two clerical errors identified by Torrington in its rebuttal brief.

CONCLUSION

This case is remanded to Commerce to correct the clerical errors identified in the computer program by SKF and Torrington in accordance with the Court's instructions. Following compliance with these instructions, the Remand Results filed by Commerce on June 5, 1997 are sustained.

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(Slip Op. 97–137)

GULFSTREAM AEROSPACE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–02–00103

[On cross motions for summary judgment, parties disputed whether subject entries of civil aircraft parts qualify for duty-free treatment under the Agreement on Trade in Civil Aircraft, where plaintiff had not filed required certifying documents simultaneously with the entry summaries. *Held:* The relevant portions of the Customs Service regulation precluding relief for failure to simultaneously file certifying documents with entry summaries were declared invalid by this Court in a previous ruling. Customs is estopped from enforcing the invalidated portions of the regulation. Plaintiff's motion for summary judgment granted.]

(Decided September 19, 1997)

*Grunfeld, Desiderio, Lebowitz & Silverman (Jonathan M. Fee, David M. Murphy),* for plaintiff.

*Frank W. Hunger,* Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Saul Davis);* of counsel: *Beth C. Brotman,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

OPINION

MUSGRAVE, *Judge:* This action is before the Court on cross-motions for summary judgment pursuant to USCIT Rule 56. Plaintiff Gulfstream Aerospace Corporation ("Gulfstream") contests the denial by the United States Customs Service ("Customs") of protests seeking duty-free entry of civil aircraft parts.

BACKGROUND

The subject of this dispute is whether civil aircraft parts, imported by Gulfstream between November 1990 and August 1991, qualify for duty-

free entry under the Agreement on Trade in Civil Aircraft ("ATCA"). When the parts in this case were entered, Gulfstream originally classified them under tariff headings which were not eligible for ATCA duty-free treatment. Customs reviewed Gulfstream's entered classifications and determined that Gulfstream's original classifications were incorrect on all but four entries,[1] and re-classified the incorrect entries. The re-classification placed the parts under tariff headings which were eligible for duty-free treatment pursuant to the ATCA.

Duty-free treatment does not apply automatically to ATCA-eligible merchandise, however. Customs regulations require that an importer file documents certifying that the parts are in fact intended for use in civil aircraft and approved by the Federal Aviation Administration ("FAA") for such use. Further, the regulations require that these certifications be filed at the same time that entry summaries for the parts are filed. The regulation language states:

> At the time of filing the entry summary, the importer of civil aircraft parts shall submit a certificate [attesting to ATCA-eligibility] * * *. Failure to provide the certification at the time of filing the entry summary or to have an approved blanket certification on file with the district director in the district where the entry summary is filed shall result in a dutiable entry.

19 C.F.R. § 10.183(c)(2) (1990). The regulations permit an importer to file the ATCA certifications either with each entry ("entry-by-entry") or to have on file a "blanket" certification covering all entries for up to one year. 19 C.F.R. § 10.183(c)(2), (d)(1)–(2) (1990).

Gulfstream had a blanket certification on file with Customs until just prior to the entry of the parts in this case. Gulfstream was prevented from maintaining its blanket certification by a Customs headquarter ruling, later overruled, and all the parts in this case were entered during the time when Customs improperly refused Gulfstream the use of a blanket certification. Thus, at the time of Customs' re-classification of the entered parts, there were no operative certifications on file with Customs; Gulfstream filed the required certifications entry-by-entry once Customs re-classified the merchandise.

Gulfstream's entry-by-entry ATCA certifications were not filed simultaneously with the entry summaries because the imported civil aircraft parts only became ATCA-eligible upon Customs' re-classification of them, which occurred after the entry summaries had been filed. Customs refused the certifications for lateness and denied duty-free treatment of Gulfstream's merchandise. Gulfstream protested under 19

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[1] There are four entries in this action which Customs did not re-classify and which remained under Gulfstream's original non-duty-free tariff headings. In its protest, Gulfstream claims these four entries (Protest Nos. 1703–93–100036, 1703–93–100038, 1703–93–100042, and 1703–93–100043) should be classified under a new, duty-free-eligible tariff heading and given duty-free treatment. *See* Mem. of Pl. in Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. and in Opp'n to Def.'s Mot. for Summ. J., Statement of Material Facts, Exhibit B, *and* Def.'s Opp'n to Pl.'s Mot. for Summ. J. and Cross-Mot. for Summ. J., Exhibit A at 1, n.5–6; 2, n.9; 4, n.19. As explained herein, the Court accepts Gulfstream's classifications as filed in its protests, including the four listed above. In addition, Customs has stipulated that certifications were properly filed with three other entry summaries, consolidated under Protest No. 1703–93–100097, and that those entries will be accorded ATCA duty-free treatment. Def.'s Mem. in Resp. to Pl.'s Opp'n to Def.'s Cross-Mot. for Summ. J. at 3, n.3. Therefore those three entries are not part of this action.

U.S.C. § 1514, claiming that the parts should have been liquidated duty-free because Customs had denied Gulfstream the use of a blanket certification and re-classified the merchandise after entry summaries had been filed; thus Customs, not Gulfstream, had made it impossible to comply with § 10.183(c)(2). There is no dispute that Gulfstream's merchandise qualifies for ATCA duty-free treatment, but for Customs' application of the regulatory language. § 10.183(c)(2) stated: "Failure to comply [with the simultaneous filing requirement] * * * shall result in a dutiable entry," which Customs held to mean that an importer who fails to file certifications and entry summaries simultaneously is barred from remedying the mistake. Customs invoked § 10.183(c)(2) and ruled that Gulfstream was precluded from any relief which would remedy the late filing and provide Gulfstream with duty-free treatment for its merchandise.

Gulfstream challenges the enforcement of the § 10.183(c)(2) language which precludes an importer from seeking relief for late filing. Gulfstream contends that the relief-preclusive language of the regulation had been invalidated by an earlier decision of this Court and that Customs is collaterally estopped from enforcing it. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a), and finds that Customs is estopped from enforcing the invalid portion of Customs Regulation 10.183(c)(2). The Court further finds that Gulfstream is entitled to relief, and Gulfstream's motion for summary judgment is granted.

## STANDARD OF REVIEW

Decisions of the Customs Service are presumed to be correct, 28 U.S.C. § 2639(a)(1) (1994), but the presumption of correctness applies solely to factual questions and it is the duty of this Court to find the correct result.[2] The classification decision entails a three-step process including a factual and a legal inquiry, and an ultimate mixed question involving both factual and legal components. The factual inquiry is subject to the "clearly erroneous" standard while the purely legal and ultimate mixed questions are reviewed *de novo*. *Bausch & Lomb, Inc. v. United States*, 21 CIT ___, ___, 957 F. Supp. 281, 284 (1997).

Both parties have moved for summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact * * * and the moving party is entitled to judgment as a matter of law." CIT R. 56(d); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "The party opposing summary judgment may not rest on its pleadings, but must respond with specific facts showing the existence of a genuine issue for trial." *Pfaff American Sales Corp. v. United States*, 16 CIT 1073, 1075 (1992) (citations omitted).

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[2] *See Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984) ("the court's duty is to find the correct result, by whatever procedure is best suited to the case at hand"), *Goodman Mfg., Inc. v. United States*, 13 Fed. Cir. (T) ___, ___, 69 F.3d 505, 508 (1995) (the statutory presumption of correctness attaches only to an agency's factual determinations), *and Rollerblade, Inc. v. United States*, 15 Fed. Cir. (T) ___, ___, Ct. No. 96-1397 at 6 (1997) (legal issues are not afforded deference under 28 U.S.C. § 2639 or under the administrative deference standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

The Court of Appeals for the Federal Circuit considers the use of summary judgment as an efficient mechanism for the resolution of disputes.

> The recent trilogy of Supreme Court cases establishes that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"

*Avia Group Int'l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557 (Fed. Cir. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); citing *Anderson v. Liberty Lobby*, 477 U.S. 242 and *Matsushita Electric Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). The Court finds that no genuine issue as to any material fact exists in this case.

## Discussion

### I. The Customs Service is estopped from enforcing the invalidated language of 19 C.F.R. § 10.183(c)(2).

Customs denied Gulfstream's protest in this case because Gulfstream did not file documents, certifying its merchandise as civil aircraft parts, at the same time as it filed the entry summary documents for that merchandise. The requirement that the certifying documents and entry summaries be filed simultaneously is found in the language of Customs Regulation 10.183(c)(2) (1990). The regulation also precludes an importer from remedying a failure to file simultaneously. Gulfstream argues that Customs is collaterally estopped from enforcing the relief-preclusive portion of the regulation because that language was declared invalid by a previous decision of this Court. Customs argues that collateral estoppel does not apply against the government, or in the alternative, that collateral estoppel does not apply in classification cases. For the following reasons, the Court finds that Customs is collaterally estopped from enforcing the invalidated language of Customs Regulation 10.183(c)(2).

The issue which Gulfstream seeks to prevent Customs from re-litigating was adjudged in *Aviall of Texas, Inc. v. United States*, 18 CIT 727, 861 F. Supp. 100 (1994), *aff'd*, *Aviall of Texas, Inc. v. United States*, 14 Fed. Cir (T) ____, 70 F.3d 1248 (1995). In *Aviall*, this Court found that Customs failed to comply with the Administrative Procedure Act ("APA") in promulgating 19 C.F.R. § 10.183. *Aviall of Texas, Inc. v. United States*, 18 CIT 727, 861 F. Supp. 100. Specifically, Customs did not make a portion of § 10.183(c)(2) available for public comment as required by the APA, and that portion, which first appeared in the final rule, was ruled invalid and unenforceable. *Id.* The invalidated portion reads as follows:

> The certification may not be treated as a missing document for which a bond may be posted. Failure to provide the certification at the time of filing the entry summary or to have an approved blanket certification on file with the district director where the entry summary is filed shall result in a dutiable entry.

19 C.F.R. § 10.183(c)(2) (1990); *Aviall of Texas, Inc. v. United States*, 18 CIT at 731, 861 F. Supp. at 104. The valid portions of § 10.183(c)(2) still require an importer to file the ATCA certifications simultaneously with the entry summary,[3] but *Aviall* held that Customs cannot preclude an importer from obtaining relief through other statutory or regulatory mechanisms to remedy or correct a failure to file simultaneously. *Id.*, 18 CIT at 731–33, 861 F. Supp. at 104–05, *aff'd*, *Aviall of Texas, Inc. v. United States*, 14 Fed. Cir (T) ____, 70 F.3d 1248 (1995).

In order for Customs to be collaterally estopped from enforcing the invalid portions of § 10.183(c)(2), Gulfstream must first overcome policy considerations set forth by the U.S. Supreme Court to establish whether collateral estoppel is available between the parties. Then, Gulfstream must meet the elements of the three-prong test of collateral estoppel to determine whether the judgment of the previous case can be applied preclusively against Customs.

A. The Supreme Court has held that a plaintiff may collaterally estop a defendant from litigating an issue which the defendant has previously litigated unsuccessfully against another party. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979). Before *Parklane*, collateral estoppel applied only in cases where both parties were parties to the prior action, and the fact that Gulfstream appeared in the *Aviall* case as *amicus curiæ* for the plaintiff against Customs, *see Aviall of Texas, Inc. v. United States*, 18 CIT 727, 861 F. Supp. 100, would not have satisfied this mutuality requirement. Since *Parklane*, however, collateral estoppel has not required mutuality. *Parklane Hosiery Co. v. Shore*, 439 U.S. at 326–31. *Parklane* gave federal courts broad discretion to determine when collateral estoppel should apply. *Id.*

The Supreme Court has limited the use of non-mutual collateral estoppel in cases where, as here, the government is the defendant. *United States v. Mendoza*, 464 U.S. 154 (1984). The issue for which preclusive effect is sought must overcome three important policy criteria: (1) whether the issue had an opportunity to develop or "percolate" among the Circuit Courts; (2) whether the government's ability and discretion to seek review of unfavorable judgments would be compromised; and (3) whether policy changes in the executive administration have been accounted for. *Id.* The Court finds that none of these considerations bars the use of estoppel in this case.[4]

The first policy concern of the *Mendoza* test was based on the concern that application of collateral estoppel against the government would "substantially thwart the development of important questions of law by

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[3] The main body of § 10.183(c)(2), which begins "At the time of filing the entry summary, the importer of civil aircraft parts shall submit a certificate * * *," was properly promulgated and is valid.

[4] Many courts and commentators have noted that application of the *Mendoza* criteria is complicated by the vagueness of the language of that opinion and the uncertainty of its scope. *See, e.g., Colorado Springs Production Credit Assoc. v. Farm Credit Adm.*, 666 F. Supp. 1475 (D. Colo. 1987). Regardless of the breadth of interpretations of that opinion by others, the Court must view a request for summary judgment in the light most favorable to the opposing party. *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In this case, the opposing party is the Customs Service. Thus, the Court will consider *Mendoza* to stand for the proposition that collateral estoppel may not be applied against Customs except where certain, albeit vague, policy considerations are overcome. The Court will simply address the policy concerns directly.

freezing the first final decision rendered on a particular legal issue." *Id.* at 160. However, since there is no other trial court which could hear a classification case, there is no other forum for legal principles to develop or "percolate." Additionally, the invalidity of the regulation in this case is based on Customs' failure to comply with the APA; there is no political policy to be implemented or legal principle to be developed. At issue here is a portion of a Customs regulation which has been declared invalid, not a Congressional statute.[5] Thus the Court finds that there is no violation of this policy consideration.

The second policy concern of *Mendoza* is also not implicated here. The *Mendoza* Court worried that the government would be forced to appeal every adverse decision for fear that it may be collaterally estopped by any judgment against it. This would usurp the discretion of the government to determine when and where it would exercise its resources. *Id.* No such concern exists here. Customs' ability and discretion to appeal was not compromised in the *Aviall* litigation—Customs did unsuccessfully appeal that decision—and Customs has the opportunity to appeal this decision. Again, it is Customs' failure to comply with the APA which makes the regulation invalid in this case. The use of collateral estoppel would not violate this *Mendoza* policy concern by chilling Customs' present and future ability to argue that the regulation is still valid, when in fact it is Customs' own failure to comply with the APA which prevents present and future enforcement of the invalid portions of § 10.183(c)(2). The Court finds no violation of the second *Mendoza* policy consideration.

The third and final policy concern of *Mendoza* is satisfied because no important government or administration policy shift has occurred, nor would a shift be impeded by the use of collateral estoppel in this case. By preventing Customs from re-litigating the issue in this case, the long-standing policy of requiring administrative agency compliance with the APA would be upheld. Forcing Customs to abide by the APA mandates does not affect the ability of the legislative branch to alter or the executive branch to implement the statute or method of APA compliance. Additionally, the policy concern of preserving judicial resources will be furthered by the use of collateral estoppel in this case: Customs will be both discouraged from refusing to comply with affirmed judgments of this Court, and encouraged to comply with the requirements of the APA. The application of collateral estoppel in this case would not prevent Customs from promulgating the invalid portions of § 10.183(c)(2) in compliance with the APA in the future.

The Court finds that all the requirements of *Parklane* and *Mendoza* have been met. However, that is only the threshold inquiry as to whether collateral estoppel is available between the parties in the present

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[5] "Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (citations omitted). Agency regulations which violate APA requirements "are to be given no legal effect" and are entitled to no judicial recognition." *Alaniz v. Office of Personnel Management*, 728 F.2d 1460, 1470 (Fed. Cir. 1984) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1974)).

case. Next, the Court must determine whether collateral estoppel is applicable to the issue of the present case.

B. To determine whether the *Aviall* judgment can be given preclusive effect against Customs in this case, the Court must first compare the facts which gave rise to the issue and outcome in *Aviall* with those presented by Gulfstream. Gulfstream must satisfy the following three tests: (1) whether the issue determined in the previous litigation is identical to the issue now before the Court; (2) whether the issue was actually litigated and the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in the prior case; and (3) whether the issue was necessary to the outcome in the previous decision. *Thomas v. General Services Admin.*, 794 F.2d 661, 664 (Fed. Cir. 1986); *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983).[6] The Court finds that all three requirements are met in this case.

The Court finds the following comparison of operative facts between the two cases sufficient to merit application of collateral estoppel. In *Aviall*, Customs denied plaintiff Aviall of Texas, Inc. ("Aviall") duty-free treatment for its imported civil aircraft parts. Customs based this decision on Aviall's failure to comply with § 10.183(c)(2). Aviall had on file a blanket certification, which would have provided automatic application of the ATCA to Aviall's eligible goods and duty-free entry for those goods. However, Aviall had allowed the blanket certification to expire and it was therefore invalid at the time the goods were entered and entry summaries filed. Aviall renewed the certification on the same day it was notified of the lapse, and additionally filed entry-by-entry certifications for the goods it had entered in the interim. But § 10.183(c)(2) specifically stated that failure to file (or have on file) these certifications at the same time as the filing of the entry summaries would preclude an importer from the benefit of the ATCA as well as from any remedial measures to correct the filing error. On the basis of that language in § 10.183(c)(2), Customs refused to provide duty-free treatment to the entered goods. Although there was no dispute that the goods were in fact civil aircraft parts and met all the requirements for duty-free entry in furtherance of the policy established by the ATCA, Customs ruled that the violation § 10.183(c)(2) was simply an absolute bar to duty-free entry. *Aviall of Texas, Inc. v. United States*, 18 CIT at 727–28, 861 F. Supp. at 101–02.

In *Aviall*, this Court struck down the portion of § 10.183(c)(2) which precluded the plaintiff from obtaining relief for its filing mistake. *Id.*, 18 CIT 733, 861 F. Supp. at 107. Customs Regulation 10.183 was published for comment in 1980, but at that time it did not include any language which would mandate dutiable entry and bar any relief. The sentence in

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[6] The Court recognizes that the collateral estoppel test is often analyzed in four, not three, parts. *But see*, *Kroeger v. United States Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988). The Court has combined the "actually litigated" and "full and fair opportunity to litigate" tests into a single prong for convenience in this case.

19 C.F.R. § 10.183(c)(2) containing this relief-preclusive language[7] first appeared to the public as part of the final rule promulgated in 1984.[8] Because the new language "establishe[d] a new substantive requirement penalizing importers for any failure to file the blanket certification," and was added to the original rule without an opportunity for public review, the Court held that it "was adopted in violation of the procedures mandated by the notice and comment provisions of the APA," and is invalid.[9] *Id.*, 18 CIT at 732, 861 F. Supp. at 105.

Gulfstream, just like the plaintiff in *Aviall*, imported goods eligible for duty-free entry under the ATCA. Gulfstream had a blanket certification on file, but Customs had rejected Gulfstream's attempts to renew it and prevented Gulfstream from using a blanket certification for almost two years.[10] The merchandise debated in this case was entered during the time when Gulfstream was prevented from having a blanket certification on file, and Gulfstream was forced to file only entry-by-entry certifications. In addition, Gulfstream erroneously entered the goods in this case under non-eligible tariff headings; Customs caught the error, changed the classifications, and liquidated the merchandise under tariff provisions which were eligible for ATCA duty-free treatment. However, Customs did not give the merchandise duty-free treatment despite their eligibility. Gulfstream protested, claiming duty-free treatment should apply, and filed the proper certifications claiming ATCA treatment along with its protests. The certifications were refused for the sole reason that they were not filed with the entry summaries,[11] despite the fact that Customs itself had made such simultaneous filing impossible by refusing Gulfstream the use of blanket certifications and re-classifying the merchandise after entry summaries had been filed.

Applying the first prong of the collateral estoppel test to this factual backdrop, the Court must determine whether the issue in the previous case is identical to the issue in this case. Gulfstream argues that it is similarly situated to the plaintiff in *Aviall*. Both Aviall and Gulfstream were

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[7] The relief-preclusive language is found in the last sentence of 19 C.F.R. § 10.183(c)(2). The *Aviall* opinion struck down the last *two* sentences of § 10.183(c)(2); the first of these two sentences added the substantive change that an ATCA certification may not be treated as a missing document for which a bond may be posted. That language is also invalid since the original notice published for public comment did not include this rule and in fact indicated that certifications could be treated as missing documents. *Aviall of Texas, Inc. v. United States*, 18 CIT at 731, 861 F. Supp. at 104.

[8] *Compare Proposed Rule: 19 C.F.R. Part 6 and 10 Civil Aircraft Agreement*, 45 Fed. Reg. 1633, 1637 (Jan. 8, 1980), *with* T.D. 84–109, 49 Fed. Reg. 19,450 (May 8, 1984), *reprinted in* 18 *Cust. Bull.* 271, 282–83 (1984).

[9] The Court notes that even if collateral estoppel were unavailable, the fact remains that the relief-preclusive language in Customs Regulation 10.183(c)(2) was not properly promulgated under the APA and is invalid. The analysis which leads to that conclusion was fully set forth in the *Aviall* opinion, 18 CIT at 729–32, 861 F. Supp. at 103–05, and is incorporated herein. That decision is at the very least *stare decisis* as to any attempts by Customs to enforce the relief-preclusive language thereafter. *See City of Boerne v. P.F. Flores*, 117 S.Ct. 2157, 2172 (1997) ("* * * the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed."); *American Lamb Co. v. United States*, 9 CIT 260, 262, 611 F. Supp. 979, 981 (1985), *vacated on other grounds*, 4 Fed.Cir. (T) 47, 785 F.2d 994 (1986) ("* * * stare decisis counsels the Court to follow [its] prior decisions. Defendant should address its arguments to the appellate court.") The fact that Customs refused Gulfstream's protest solely on the basis of this invalid regulation is enough by itself to deny Customs' motion for summary judgment, and weighs heavily in favor of granting Gulfstream's motion for summary judgment.

[10] Customs prevented Gulfstream from using blanket certifications in HQ 222460 (Nov. 8, 1990). Customs admitted that its decision to do so was erroneous and reversed itself in HQ 223654 (Sept. 4, 1992).

[11] Customs denied all of Gulfstream's protests by reference to a single ruling letter, HQ 224524 (July 19, 1993), which stated that "The presentation of the entry-by-entry certification[s] at the time of filing the protest cannot be accepted because [the preclusive language of] the regulations require[s] it to be submitted at the time the entry summary is filed."

importing civil aircraft parts, and seeking duty-free entry pursuant to the ATCA. The only divergence is one of a minor fact, but the legal result of that fact is the same: Aviall originally sought duty-free entry under eligible tariff headings but failed to have a valid blanket certification on file at the time of filing the entry summaries, while Gulfstream was not even aware that its merchandise was ATCA-eligible until Customs reclassified the merchandise as such after the entry summaries had been filed. Aviall's failure to comply with § 10.183(c)(2) was due to inadvertence, while Gulfstream was prevented from meeting the filing requirements by Customs' refusal of a blanket certification and Customs' actions in changing the classifications. Both plaintiffs were barred from correcting the filing timing errors by the preclusive language of § 10.183(c)(2), which is invalid. To use this Court's previous descriptive, Customs "snared" both plaintiffs "in a classic 'gotcha.'" *Aviall of Texas, Inc. v. United States*, 18 CIT at 735, 861 F. Supp. at 107. The Court finds that the essential and primary legal issue in this case remains unchanged from *Aviall*—neither the APA nor the regulation has changed, nothing has altered the fact that the relief-preclusive language of § 10.183(c)(2) was improperly enacted and, therefore, Customs cannot bar Gulfstream from relief for late filing of ATCA duty-free entry certifications.

The second prong of the collateral estoppel test is easily met in this case. The government fully briefed and vigorously argued the issue of the validity of § 10.183(c)(2) before this Court and on appeal to the CAFC. Neither party in this case makes any intimation that Customs suffered from inadequate representation in *Aviall*. The Court finds that the validity issue was actually litigated, and Customs had a full and fair opportunity to conduct its litigation. The fact that Customs failed to *successfully* litigate the validity issue is not relevant to the test and does not bar, but rather supports, the application of collateral estoppel.[12]

The third prong of the collateral estoppel test is met because holding the relief-preclusive portion of § 10.183(c)(2) invalid was necessary to the *Aviall* decision. In order to receive duty-free treatment of civil aircraft parts, an importer must comply with the regulatory scheme Customs has implemented, including the filing of ATCA certifications. An importer can satisfy the ATCA certification requirement in two ways, either by filing the certifications at the same time as the entry summaries for the civil aircraft parts are filed, or, if the importer fails to file the certifications at the same time as the entry summaries, by satisfying the requirements of 19 U.S.C. § 1520 (1988) or 19 C.F.R. § 10.112 (1990), which allow an importer to correct the filing failure and obtain duty-free treatment for its civil aircraft parts.

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[12] In *Cabot Corp. v. United States*, 12 CIT 664, 670–71, 694 F. Supp. 949, 954–55 (1988), the Court discussed other factors that can be considered at this stage of the collateral estoppel test. The Court noted that the previous judgment must have been final, and adverse to the party against whom the preclusive effect is sought in the present case. Additionally, the judgment should be one from which the adversely affected party could appeal. In *Cabot*, the earlier judgment had been in favor of the government, which prevented the government from appealing and thus collateral estoppel was not appropriate. *Id.* The *Aviall* decision was final, adverse to the Customs Service, and Customs could and did appeal; thus, all the *Cabot* factors weigh in favor of applying collateral estoppel in this case.

In *Aviall*, it was Customs' position that the language in the last sentence of the final version of 19 C.F.R. § 10.183(c)(2) absolutely precluded an importer from recourse to the statutory and regulatory relief of § 1520 and § 10.112. *Aviall of Texas, Inc. v. United States*, 18 CIT at 729, 861 F. Supp. at 107; *see also* HQ 224524 (July 19, 1993), *and* HQ 716812 (October 27, 1981). The finding that the requirement was invalid was essential to a judgment in favor of the plaintiff in *Aviall* because only then could the Court proceed to analyze Aviall's claim for relief under § 1520 and § 10.112. *Aviall of Texas, Inc. v. United States*, 18 CIT at 727–29, 733, 861 F. Supp. at 101–06.

The Court determined that Aviall's actions constituted inadvertence, an error which is correctable under § 1520. *Id.*, 18 CIT at 734–35, 861 F. Supp. at 106–07. In response to Customs' argument that Aviall could not file the certifications late under § 10.112 because Aviall's failure to file constituted "negligent inaction," the Court also found that the remedial provisions of § 10.112 permit the late filing of free-entry documentation and afforded Aviall relief from Customs' denial of its protests. *Id.*, 18 CIT at 729, 732–33, 861 F. Supp. at 102, 105–07. Thus, Aviall was granted relief as a culmination of a chain of logic, from invalidating the language of § 10.183(c)(2) which precluded relief, to application of the statutory and regulatory mechanisms for relief.

The relief granted to the plaintiff in *Aviall* was analyzed and affirmed on appeal without an examination of the language of § 10.183(c)(2). *Aviall of Texas, Inc. v. United States*, 14 Fed. Cir. (T) ____, 70 F.3d 1248. Customs is now attempting to use that fact against Gulfstream, by arguing that based on the CAFC's decision not to review the validity issue, the holding of this Court in *Aviall* must have been mere *obiter dictum*. Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. and Cross-Mot. for Summ. J. at 26. An importer who fails to meet the first requirement of 10.183(c)(2), filing the certifications at the same time as entry summaries, would not receive duty-free treatment for its civil aircraft parts, unless the importer could successfully meet the requirements for remedial relief under § 1520 or § 10.112. Customs' position in *Aviall* was that the "unless" had been removed by the last sentence of § 10.183(c)(2). Customs adamantly argued that under its interpretation of § 10.183(c)(2), failure to file certifications and entry summaries simultaneously resulted in dutiable entry, and that the Court was absolutely precluded from granting relief under § 1520 and § 10.112. Customs maintains this position today based on the CAFC's decision not to review the validity issue.[13]

Customs' attempt at analytical prestidigitation ignores the essential contradiction its position creates. Customs argues on the one hand that § 10.183(c)(2) is valid and absolutely preclusive of relief to Gulfstream, because the CAFC declined to reach the validity issue. On the other hand Customs agrees that relief under § 1520 is available to an importer

[13] Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. and Cross-Mot. for Summ. J. at 25–26.

who violates § 10.183(c)(2), because the CAFC affirmed at least that much of the *Aviall* opinion. Customs cannot have it both ways—either an importer is or is not precluded by § 10.183(c)(2) from reaching relief mechanisms—but Customs must attempt to maintain these diametrically opposed arguments in order to challenge the third "necessity" prong of the collateral estoppel test. The CAFC's decision not to examine the validity issue does not give Customs a license to ignore this Court's pronouncement in *Aviall*, which was not reversed, vacated, remanded or modified in any part, *see infra* Part C. A reading of the *Aviall* opinion more than satisfies the Court that the validity issue was essential because the next analytical step could not have been taken without it, and was therefore "necessary" to the *Aviall* decision. Thus, the Court rejects Customs' argument. The Court finds that all three prongs of the collateral estoppel test are met and Customs is barred from enforcing the invalid language of 19 C.F.R. § 10.183(c)(2).

C. Customs further argues that collateral estoppel does not apply to classification cases. The precise issue at hand—the issue which Customs is estopped from enforcing and re-litigating—is the validity of a Customs regulation, and not a dispute as to which between two or among several tariff headings should apply to the merchandise in this case.[14] However, the validity determination is directly related to Gulfstream's plea for duty-free entry of its aircraft parts. "[T]he determination of whether certain merchandise is eligible for duty-free treatment under programs [which allow such duty-free entry] is a classification dispute, and, as such, a legal determination." *Executone Information Systems v. United States*, 14 Fed. Cir. (T) ____, ____, 96 F.3d 1383, 1385 (1996). The Court agrees that the case at bar is a classification case, but finds that the policy rationale which generally prevents the use of collateral estoppel in such cases is not applicable here and in fact supports the application of estoppel against Customs.

The Supreme Court has ruled that collateral estoppel is inapplicable to classification cases. *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927), and its progeny established that the use of collateral estoppel in classification cases could cause "inequality in the administration of the customs law." *Id.* at 236.

> If [an importer] can rely upon a conclusion in early litigation as one which is to remain final as to it, and not to be reheard in any way, while a similar importation made by another [importer] may be tried and heard and a different conclusion reached, a most embarrassing situation is presented. The [importer] which has by the principle of the thing adjudged obtained a favorable decision permanently binding on the government will be able to import the goods at a much better rate than that enjoyed by other [importers], its competitors.

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[14] Gulfstream is not contesting the tariff headings under which Customs has re-classified its imported civil aircraft parts. *See also*, *supra*, footnote 1. Gulfstream seeks the addition of the "C" prefix, indicating duty-free status, to the classifications which Customs has determined properly encompass Gulfstream's merchandise.

*Id.* Because of the unique and continually shifting facts of merchandise classifications, "a determination of fact or law with respect to one importation is not res *judicata*[15] as to another importation of the same merchandise by the same parties." *Schott Optical Glass, Inc. v. United States,* 3 Fed. Cir. (T) 35, 36, 750 F.2d 62, 64 (1984).

However, the issue of the validity of a portion of a Customs regulation does not raise the policy concern addressed by Justice McReynolds above. It is not the classification of Aviall's merchandise to which Customs is bound today; *Stone & Downer* concerns would only be invoked if applying estoppel against Customs would force Customs to classify Gulfstream's merchandise under the same tariff headings as Aviall's imports. That is not the case here. On the contrary, applying collateral estoppel against the government in this case is in the interest of justice. Aviall and Gulfstream both imported civil aircraft parts and were denied the privileges of a statutory program granting them free-entry of those parts because of a failure to comply with an *invalid* regulation. Despite being similarly situated, they would receive differing treatment if § 10.183(c)(2) were held invalid as to one but not the other. To ensure equal treatment to Aviall, Gulfstream and all importers, the Court finds that the validity issue adjudicated in *Aviall* must be preclusive against the Customs Service.

This result is particularly necessary where Customs has refused to abide by the decision of this Court. Customs has not stipulated to the *Aviall* result, and is openly refuting this Court's holding that the relief-preclusive language of § 10.183(c)(2) is invalid.[16] Customs has hinted in its briefs and at oral argument that it believes the Court's pronouncement in *Aviall* was in "clear error" sufficient to merit overruling that determination. *See* Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. and Cross-Mot. for Summ. J. at 29, 31.[17] Customs correctly notes that it is permitted to attempt to show that a previous decision was "clearly erroneous" and ought not be followed. *Schott Optical Glass, Inc. v. United States*, 3 Fed. Cir. (T) at 37, 750 F.2d at 64 (citations omitted). "The issue * * * is not whether the arguments [in the previous case] are the same [as those presently before the Court] but whether the new evidence would show that the rejection of those arguments in the prior case was clearly erroneous." *Id.* Customs has not offered any evidence nor advanced any argument to indicate what "error" may be present in the

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[15] Collateral estoppel is a subset of *res judicata* principles. *See Cabot*, 12 CIT at 670, n.5, 694 F. Supp. at 953–54, n.5.

[16] *See, e.g.*, HQ 546092 (Sept. 16, 1996), *and* HQ 952029 (Jan. 1, 1995).

[17] Customs spends fifteen pages of its final brief trying to explain why Gulfstream is wrong to assert that the last two sentences of § 10.183(c)(2) are invalid. *See* Def.'s Mem. in Resp. to Pl.'s Opp'n to Def.'s Cross-Mot. for Summ. J. at 25–40. Customs misses the point on two counts. First, the validity issue has already been litigated and decidedly adversely against Customs in the *Aviall* decision; it is not Gulfstream's but rather this Court's assertion that § 10.183(c)(2) contains improperly promulgated and unenforceable language. Second, because of the *Aviall* judgment and under the *Schott* authority which Customs itself cites, Customs may not re-litigate the validity issue unless it can show some "clear error" which the Court committed in reaching the *Aviall* decision. Customs' exposition fails to identify error in *Aviall*, and thus Customs' attempts at re-litigating that case are rejected.

*Aviall* decision.[18] This bald unsupported defiance of the rulings of this Court falls somewhere between wishful thinking and contempt. The Court holds that the Customs Service is enjoined from enforcing the invalidated language of § 10.183(c)(2) and precluding an importer from seeking relief from the simultaneous filing requirement.

Although Customs correctly notes and describes the propositions in *Stone & Downer* and *Schott*, those rules of law do not fit with this case. The Court finds that the considerations which caution against the use of collateral estoppel are clearly outweighed by the facts and setting of this case, and that Gulfstream has met all the requirements necessary to apply collateral estoppel against Customs. The Court also finds that a determination as to the validity of a Customs regulation is not prohibited but rather encouraged by the policy contemplated in *Stone & Downer*. The Court concludes that Customs is estopped from enforcing the relief-preclusive language of the last sentence of Customs Regulation 10.183(c)(2).

II. CUSTOMS ERRED IN REFUSING TO ACCEPT GULFSTREAM'S ATCA CERTIFICATIONS AND IN DENYING GULFSTREAM DUTY-FREE TREATMENT.

Customs erred in denying Gulfstream's protest because its denial was based solely on regulatory language which is invalid and unenforceable. However, that is not enough by itself to attach the "C" prefix to the classifications of Gulfstream's merchandise and grant duty-free treatment to Gulfstream's civil aircraft parts. The valid portions of § 10.183(c)(2) still require filing certifications at time of entry.[19] Thus, Gulfstream must demonstrate that its filing of ATCA certifications along with its protests was proper. Gulfstream asserts that remedial relief is available under 19 U.S.C. § 1520, or 19 C.F.R. § 10.112. The Court finds that Gulfstream is entitled to duty-free treatment by operation of 19 C.F.R. § 10.112.

A. The Court finds that relief under 19 U.S.C. § 1520 is not appropriate in this case. An importer may request a re-liquidation of an entry to correct "a clerical error, mistake of fact, or other inadvertence." 19 U.S.C. § 1520(c)(1) (1988). "[A] clerical error is a mistake made by a clerk or other subordinate, upon whom devolves no duty to exercise judgement, in writing or copying the figures or in exercising his intention." *PPG Industries, Inc. v. United States*, 7 CIT 118, 124 (1984) (citations omitted). A mistake of fact exists where a person understands the facts to be other than they are, such as where a fact exists but is unknown or where a person believes that something is a fact when in reality it is not. *Hambro Automotive Corp. v. United States*, 66 CCPA 113, 118, 603 F.2d 850, 855 (1979); *C.J. Tower & Sons of Buffalo, Inc. v.*

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[18] In *Schott*, the CAFC found that the protesting importer should have been allowed to introduce new expert testimony which cast serious doubt on the Court's prior interpretation of a technical term. *Schott Optical Glass, Inc. v. United States* 3 Fed. Cir. (T) at 38, 750 F.2d at 64–65. The importer was able to make "an extensive offer of proof of what the new evidence would show." *Id.* Customs has not cast doubt on this Court's prior interpretation of clear APA mandates nor has Customs made an extensive offer of new evidence.

[19] "At the time of filing the entry summary, the importer of civil aircraft parts shall submit a certificate [attesting to ATCA-eligibility] * * *." 19 C.F.R. § 10.183(c)(2) (1990).

*United States*, 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 61 CCPA 90, 499 F.2d 1277 (1974). Inadvertence is defined as "an oversight or involuntary accident, or the result of inattention or carelessness, and even as a type of mistake." *Occidental Oil & Gas Co. v. United States*, 13 CIT 244, 246 (1989) (citation omitted). However, a mistake of law, which exists where a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts, is not remediable under § 1520. *Hambro Automotive Corp. v. United States*, 66 CCPA at 118, 603 F.2d at 855 (1979) (citations omitted).

The Court does not decide today whether Gulfstream's entered classifications were the result of a mistake of fact or law. It is sufficient to note that Gulfstream has not demonstrated that its entered classifications were due to a mistake of fact or other error remediable by § 1520. The Court can speculate as to what caused Gulfstream to originally enter the merchandise in this case under non-ATCA-eligible tariff headings, and the Court notes that Gulfstream, by virtue of the fact that it was denied the use of a blanket certification and forced to file entry-by-entry certifications, could easily have committed error. But § 1520 requires more than speculation. *ITT Corp. v. United States*, 12 Fed. Cir. (T) ____, ____, 24 F.3d 1384, 1387 (1994). Section 1520 must be satisfied by concrete evidence, although the required substantiation may be made at any time up to trial. 12 Fed. Cir. (T) at ____, 24 F.3d at 1386. The Court finds that Gulfstream has not alleged a mistake or error which would permit late filing of its ATCA certifications under § 1520.

Customs argues that Gulfstream cannot bring a § 1520 claim where it failed to raise the issue in its protest. The Court is unconvinced that it is precluded from examining all potential avenues of relief for an importer who properly files a § 1514 protest, and notes that "the CIT is to determine *de novo* whether a mistake has been made, as opposed to determining *de novo* whether all the requirements of § 1520 have been met," *Executone Information Systems v. United States*, 19 CIT ____, ____, 896 F. Supp. 1235, 1239 (1995). However, the Court need not and does not address this issue further, because the Court finds that Gulfstream has not demonstrated a mistake of fact or other error in its protest, its briefs or at oral argument on the motions for summary judgment. The Court also finds that it would be an injustice to shoehorn Gulfstream into claiming it made a mistake when in fact the dispute in this case arose from Gulfstream following Customs' directions at every turn. Thus the Court concludes that Gulfstream is entitled to relief, but that § 1520 is an inappropriate mechanism for granting relief in this case.

B. The Court finds that Gulfstream is entitled to relief under 19 C.F.R. § 10.112. Customs established this regulatory measure to ease the burdens associated with the merely ministerial filing acts required for duty-free or reduced duty entry:

> Whenever a free entry or a reduced duty document, form, or statement required to be filed in connection with the entry is not filed at the time of the entry or within the period for which a bond was filed

> for its production, but failure to file it was not due to willful negligence or fraudulent intent, such document, form or statement may be filed at any time prior to liquidation of the entry, or, if the entry was liquidated, before the liquidation becomes final.

19 C.F.R. § 10.112 (1990). "[I]t is clear that the regulation was promulgated to make the privilege of free entry 'less onerous' by extending the time for filing of claim-supporting documents and, thereby, enabling free entry of merchandise that would otherwise have been excluded from such treatment." *Mattel, Inc. v. United States*, 67 CCPA 74, 77, n.8, 624 F.2d 1076, 1079, n.8 (1980) (quoting *Bertrand Freres, Inc. v. United States*, 47 Cust. Ct. 155, 159 (1961)).

In *Aviall*, the Court described § 10.112 as being "*remedial* in nature" and noted that:

> At the time [19 C.F.R. § 10.112] was promulgated, Customs stated that the purpose of the regulation was 'to relieve certain existing restrictions to the filing of *free* entry documents." This regulation provides for the late filing of *duty free* entry documents or reduced duty documents *after* entry. The language of 19 C.F.R. § 10.112 does not limit its application to certain documents or exclude certain documents. In addition, Customs did not amend 19 C.F.R. § 10.112 when it promulgated the obligatory language of 19 C.F.R. § 10.183 nor did Customs state that 19 C.F.R. § 10.183 was an exception to the broad remedial effect of 19 C.F.R. § 10.112. Customs promulgated 19 C.F.R. § 10.112 to alleviate onerous filing requirements arising out of the narrow construction of duty entitlements; therefore, 19 C.F.R. § 10.112 should be liberally construed.

*Aviall of Texas, Inc. v. United States*, 18 CIT at 732, 861 F. Supp. at 105 (citations omitted) (emphasis in original). The Court stated that "19 C.F.R. § 10.112 explicitly provides for the late filing of documentation absent willful negligence," *id.* at n.7 (citing *Mattel, Inc. v. United States*, 67 CCPA 74, 624 F.2d 1076), and that this relief would be available regardless of the mandatory nature of other regulations, *Aviall of Texas, Inc. v. United States*, 18 CIT at 732, 861 F. Supp at 105. In conformity with Customs' stated goal of relieving filing restrictions, such as those found in the valid portions of 19 C.F.R. § 10.183(c)(2), the Court finds that Gulfstream is permitted to file its ATCA duty-free-entry certifications for the merchandise in this case after the filing of its entry summaries.

Despite the liberal policy of § 10.112, Customs advances two arguments to oppose the application of § 10.112 relief to Gulfstream, both of which fail. The first is that the CAFC in *Aviall*, finding that relief under 19 U.S.C. § 1520 was sufficient to remedy the plaintiff's claim, declined to reach the question of whether § 10.112 relief would be available to the plaintiff in that case. Therefore, Customs asserts, the Court cannot now apply § 10.112. This argument goes to the collateral estoppel question, however. The Court has found that Customs is collaterally estopped from enforcing the invalid language of 19 C.F.R. § 10.183(c)(2); it is not collateral estoppel that requires Customs to grant Gulfstream relief un-

der § 10.112. Because the Court will analyze Gulfstream's eligibility for § 10.112 relief independently, Customs' first argument is rejected.

Next, Customs argues that § 10.112 cannot apply to this case because § 10.112 relief is only available when filing of documents is required "in connection with" entry, as opposed to the phrase "at time of" entry. The valid portions of §10.183(c)(2) require that duty-free claim-supporting documents must be filed at time of entry: "At the time of filing the entry summary, the importer of civil aircraft parts shall submit a certificate * * *." 19 C.F.R. § 10.183(c)(2) (1990). Customs attempts to elevate a purely semantic distinction between the phrases "in connection with" and "at time of" entry to a term of art. The Court finds that Customs' inconsistent usage of these terms over time and the history of § 10.112 render Customs' argument without merit.

The Court finds that Customs' interpretation of the phrase "in connection with" entry has been inconsistent over time, and Customs' actual practice indicates no intention to create a distinction between this phrase and "at time of" entry. In 19 C.F.R. § 141.0a (1990), Customs set forth definitions for terms which are "used in connection with the entry of merchandise." In that section, Customs defines "entry," "entry summary," and "filing," without any mention of or distinction from "at time of" entry, and without any indication that "in connection with" entry was being used other than colloquially. The fact that Customs uses the phrase "in connection with" in a variety of ways, *see, e.g.*, HQ 654106 (Mar. 21, 1986) ("In connection with attempted false entry, (name deleted) plead guilty to criminal violations * * *") convinces the Court that Customs has not vested either phrase with legally significant meaning.

Customs has explicitly held that § 10.112 allows duty-free documentation to be submitted with a protest, even where the documentation was required at time of entry:

> [A]lthough the proper documentation * * * establishing protestant's GSP claim, was not filed *at the time of entry*, as long as failure to file it was not due to willful negligence or fraudulent intent, the documentation may be filed at any time before liquidation or * * * before liquidation became final * * *. [I]f liquidation was timely protested, the protestant should be afforded an opportunity to submit documentation establishing free or reduced duty entry.

HQ 544455 (Mar. 14, 1995) (citing HQ 555269 (Dec. 20, 1990)) (emphasis added).

> The protestant was required to file, *in connection with its entries*, documents that would have established the eligibility of its merchandise for a duty reduction * * *. [T]he protestant did not file the necessary documents *at time of entry*, but submitted them [five months after liquidation] * * *. 19 CFR 10.112 [sic] [ ] provides that if the importer fails to file the documents [ ] *at the time of entry* * * * but failure to file was not due to willful negligence or fraudulent intent, then they may be filed at any time prior to [final] liquidation * * *.

HQ 221603 (April 30, 1991) (emphasis added).

> 19 CFR 10.112 [sic] provides * * * that a free entry document required *in connection with entry* * * * may be filed before liquidation becomes final, if lack of presentation *at time of entry* was not willful or negligent. This section is applicable because [the regulation requiring reduced duty documentation] requires [the documentation] *at the time of entry.*

HQ 557707 (May 4, 1994) (emphasis added). Clearly Customs' usage of the phrases "in connection with" entry and "at time of" entry has been interchangeable and devoid of any legal distinction.

Customs cites no case, statutory or regulatory authority, or ruling letter to support its position. Customs' assertion that two previous cases of this Court created a distinction between the phrases "in connection with" and "at time of" is inapposite. In the cases Customs looks to for support, the Court distinguished between requirements to file documents on *entry*, which directly implicate § 10.112, and those regulations requiring filing before *export*, which do not invoke § 10.112; nowhere is there mention of "in connection with" entry or "at time of" entry distinctions.[20]

Customs has in the past asserted that § 10.112 cannot be applied in cases involving civil aircraft part importations, because the relief-preclusive language of 19 C.F.R. § 10.183(c)(2) mandated a dutiable entry for failure to comply with the simultaneous filing requirement therein. *See* HQ 556790 (Jan. 13, 1993), *and* HQ 223871 (July 24, 1992). By its own interpretation in these rulings, the relief-preclusive language of § 10.183—invalidated by this Court—is the only impediment to § 10.112 relief. The Court rejects the whole of Customs' arguments and finds nothing to bar the application of § 10.112 to an importer's entry of civil aircraft parts.

In order for Gulfstream to qualify for the remedial relief of § 10.112, it must first demonstrate that it filed the free-entry documentation prior to liquidation or prior to liquidation becoming final. 19 C.F.R. § 10.112 (1990). The entries in this case were liquidated, but Gulfstream filed its ATCA certifications prior to the liquidation becoming final. Gulfstream filed its ATCA certifications along with its properly filed protests of Customs' decision to liquidate the entries as dutiable. A properly filed protest stays the finality of a Customs liquidation if the protest is filed within ninety days after the notice of liquidation.[21] Gulfstream's merchandise was liquidated between January 4 and 28, 1993, and Gulfstream protested the liquidations on February 10, 1993, within the period required by § 1514. Gulfstream filed the ATCA certifications along with its § 1514 protests, and thus they are deemed filed before liq-

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[20] *See Export Packers Co., Ltd. v. United States*, 16 CIT 394, 795 F. Supp. 422 (1992), *and F.W. Myers & CO., Inc. v. United States*, 72 Cust. Ct. 133, 137, 374 F. Supp. 1395, 1399 (1974) ("Since the former [the phrase 'in connection with entry'] does not refer to the same period of time as the latter [the phrase 'before the exportation of the merchandise'], the two are unrelated * * *.").

[21] "[D]ecisions of the appropriate customs officer * * * as to—(2) the classification and rate and amount of duties chargeable * * * shall be final and conclusive * * * unless a protest is filed in accordance with this section." 19 U.S.C. § 1514(a) (1988). "A protest * * * shall be filed with such customs officer within ninety days * * *." § 1514(c)(2).

uidation became final. The Court finds that Gulfstream has met the threshold inquiry of § 10.112 eligibility.

The Court must next examine whether Gulfstream demonstrated willful negligence or fraudulent intent sufficient to preclude § 10.112 applicability. Customs does not argue that Gulfstream committed willful negligence or had fraudulent intent in filing the ATCA certifications along with its protests instead of with the entry summaries. The Court finds that Gulfstream's actions do not constitute willful negligence or fraudulent intent and that Gulfstream may claim relief under § 10.112.

The standard for willful negligence and fraudulent intent was set forth by the Court of Customs and Patent Appeals ("CCPA") in *Mattel, Inc. v. United States*, 67 CCPA 74, 624 F.2d 1076. The party seeking application of § 10.112 bears the burden of proving freedom from willful negligence and this burden must be met by concrete evidence. *Id.*, 67 CCPA at 78, 624 F.2d at 1080 (citations omitted). The CCPA found that "*positive action* demonstrating absence of willful negligence" is sufficient to meet the burden. *Id.*, 67 CCPA at 79, 624 F.2d at 1080 (emphasis in original).

In *Mattel*, the Customs Court found plaintiff Mattel, Inc. ("Mattel") to have intentionally not filed documents necessary for duty-free entry of its merchandise as required by a (valid) Customs regulation. The Court denied Mattel relief under § 10.112, but the CCPA disagreed, finding that "intentional" did not equate to "willful" under the § 10.112 standard. *Id.*, 67 CCPA at 76–77, 624 F.2d at 1078–79. Analogizing to federal tax law, the CCPA noted that the Supreme Court requires "bad purpose or evil motive to meet the statutory provision of willfulness." *Id.*, 67 CCPA at 78, 624 F.2d at 1080 (citations omitted). Despite the Customs Court's finding that Mattel had intentionally not filed the necessary documents, the CCPA found that Mattel's actions did not constitute evidence of "any bad motive or reckless disregard for the Customs Service in failing to file its free-entry, claim-supporting documents." *Id.*, 67 CCPA at 79, 624 F.2d at 1080. Rather, the fact that Mattel exercised its judicial remedies, and notified Customs that it was doing so, was "positive action" enough to satisfy the CCPA that there was no wilful negligence in its actions. *Id.*

The record clearly demonstrates a complete absence of bad purpose or evil motive on the part of Gulfstream. Gulfstream filed the certifications as soon as it became aware of Customs' decision to re-classify the merchandise under ATCA-eligible tariff headings, the first moment in time at which the merchandise was eligible for duty-free status requiring the filing of ATCA certifications. Even if Customs could prevent the operation of § 10.112 by holding an importer to the "intent" it had to enter merchandise under its initial classifications while liquidating those entries under different classifications, that argument would fail because "intentional" does not rise to the level of willful negligence, *see id.*, 67 CCPA 74, 624 F.2d 1076.

The Court is further influenced by the fact that Gulfstream continued to challenge Customs' 1990 ruling prohibiting Gulfstream from using blanket certifications, in an effort to prevent precisely the type of problem which Customs' re-classification decision created here. Additionally, like the plaintiff in *Mattel*, Gulfstream exercised its judicial remedies, and notified Customs of that decision. The Court finds that Gulfstream has demonstrated "positive action" and was not willfully negligent or intentionally fraudulent in this case. Thus, Gulfstream should be granted § 10.112 relief.

The Court concludes that the clear language of § 10.112, the policy buttressing its implementation, the cases and ruling letters interpreting it, and the facts of this case offer Gulfstream the ability to claim duty-free status for its merchandise. The Court finds Gulfstream's ATCA certifications should have been accepted, and that, pursuant to them, the "C" prefix denoting duty-free status should be added to the classifications of the merchandise listed in all of Gulfstream's protests in this action. The Court orders Customs to re-liquidate the merchandise in this action duty-free.

### III. GULFSTREAM IS ENTITLED TO SUMMARY JUDGMENT AND DUTY-FREE ENTRY OF ITS MERCHANDISE.

Customs has raised a question "as to the substantive sufficiency of the customs forms which have been filed herein,"[22] namely, the validity of Gulfstream's ATCA certifications. Customs asserts that there is no evidence that the civil aircraft parts were in fact certified for use in civil aircraft by the FAA as required by the valid portions of 19 C.F.R. § 10.183. The Court disagrees for two reasons.

First, the record indicates that the certifications are complete. The valid portions of Customs Regulation 10.183 set forth the form the certification is to take and include the requirement that:

> The article(s) * * * has (have) been approved for use in civil aircraft by the Administrator of the Federal Aviation Administration * * * [or that] [a]n application for approval for use in civil aircraft for the article(s) * * * has been submitted to, and accepted by, the [FAA].

19 C.F.R. § 10.183(d) (1990). Gulfstream attested to FAA certification as required. Customs' rejection of the Gulfstream's ATCA certifications was not due to a belief that Gulfstream was mistaken or fraudulent in its assertion that its civil aircraft parts had FAA approval. A review of past cases and Customs rulings demonstrates that Customs has never challenged the veracity of Gulfstream's certifications nor refused Gulfstream duty-free entry for failure to properly and truthfully attest to FAA approval of its civil aircraft parts.[23] The record shows that Gulfstream's ATCA certifications were complete and would have been accepted but for Customs' application of an invalid regulatory mandate.

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[22] *See Bertrand Freres, Inc. v. United States*, 47 Cust. Ct. at 160.

[23] The Court need not, but is willing, to take judicial notice of the fact, as ably pointed out by plaintiff at oral argument, that the aircraft which Gulfstream manufactures are among the most respected and well-known in the world, and that it is therefore unreasonable to suggest a lack of FAA approval. *See* Fed. R. Evid. 201 (1996).

Second, Customs, by its own ruling, allows Gulfstream to correct the assertions in its certifications even after final liquidation. In HQ 223654 (Sept. 4, 1992),[24] Customs held that where an item originally intended for use in civil aircraft is later diverted to use in a military aircraft manufacture—a use which would not meet FAA approval—the importer will be deemed to have met the ATCA certification requirement so long as the original certification was filed in good faith.

> The issue raised is that of intent. In accordance with the statute, the certification pledges that the imported merchandise is imported for use in civil aircraft and that it will be so used. So long as an importer has the requisite good faith intent at the time merchandise is entered under a certification, there is compliance with the statute.

HQ 223654 (Sept. 4, 1992). The record is devoid of any evidence of bad faith on the part of Gulfstream. The Court dismisses Customs' rearguard argument and finds that it does not raise a genuine issue of fact which would prevent the application of summary judgment to this case.

The Court finds summary judgment to be applicable to this case and the appropriate medium for granting Gulfstream relief in this case. Because Customs denied Gulfstream's protest solely on the basis of an invalid regulatory mandate, a mandate which Customs is estopped from enforcing, the protests were wrongfully denied. Gulfstream has satisfied the elements necessary to remedy the controversy in this case. The Court therefore finds that all of Gulfstream's protests should have been granted and the "C" prefix attached to the classifications therein, and the Customs Service shall re-liquidate the entries duty-free.

## CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is granted.

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[24] It is this ruling letter in which Customs reversed its earlier position and reinstated Gulfstream's right to file a blanket certification for future imports of civil aircraft parts. *See supra*, footnote 10.

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